Docket for 03-13

No. 03-13	Status: ARGUED
Title:	Republic of Austria, et al., Petitioners v. Maria V. Altmann
Docketed:	July 1, 2003
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(01-56003, 01-56398)
Decision Date:	December 12, 2002
Rehearing Denied:	April 28, 2003

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 13 2003	Application (02A952) for a stay of the mandate pending certiorari, submitted to Justice O'Connor.
May 13 2003	(02-952) Application granted by Justice O'Connor pending receipt of response and further order of this Court.
May 15 2003	Response to application from respondent Maria Altmann filed.
May 15 2003	Reply of applicant Republic of Austria, et al. filed.
May 19 2003	Application (02A952) referred to the Court by Justice O'Connor.
May 19 2003	Application (02A952) granted by the Court.
Jun 27 2003	Petition for writ of certiorari filed. (Response due July 31, 2003)
Jun 27 2003	Supplemental Appendix of petitioner filed.
Jul 23 2003	Brief of respondent Maria V. Altmann in opposition filed.
Aug 6 2003	DISTRIBUTED for Conference of September 29, 2003.
Aug 8 2003	Reply of petitioners Republic of Austria, et al. filed. (Distributed)
Sep 19 2003	Letter from counsel for petitioners Republic of Austria, et al.received. (Distributed)
Sep 19 2003	Letter from counsel for respondent Maria V. Altmann received. (Distributed)
Sep 30 2003	Petition GRANTED limited to Question one presented by the petition.
Nov 13 2003	Brief amicus curiae of Societe Nationale des Chemins de Fer Francais filed.
Nov 14 2003	Joint Appendix filed.
Nov 14 2003	Brief of petitioners Republic of Austria and the Austrian Gallery filed.
Nov 14 2003	Brief amicus curiae of Japan filed.
Nov 14 2003	Brief amicus curiae of United Mexican States filed.
Nov 14 2003	Brief amicus curiae of United States filed.
Dec 10 2003	SET FOR ARGUMENT Wednesday February 25, 2004.
Dec 16 2003	Brief of respondent Maria V. Altmann filed.
Dec 17 2003	CIRCULATED.
Dec 19 2003	Brief amici curiae of Austrian Jewish Community and American Jewish Congress filed. (Distributed)
Dec 19 2003	Brief amici curiae of Bet Tzedek Legal Services and the American Jewish Committee filed. (Distributed)
Dec 19 2003	Brief amici curiae of Michael Berenbaum, et al. filed. (Distributed)
Dec 23 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jan 7 2004	Record received from the U.S.C.A. for the 9th Circuit. (1 envelope)

Jan 12 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 13 2004	Record received from the U.S.D.C for Central Dist of California. (1 box)
Jan 20 2004	Reply of petitioners Republic of Austria, and the Austrian Gallery filed. (Distributed)
Feb 25 2004	Argued. For petitioners: Scott P. Cooper, Los Angeles, Cal.; and on behalf of the United States, as amicus curiae, Thomas G. Hungar, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent: E. Randol Schoenberg, Los Angeles, Cal.

Supreme Court, U.S.
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No. 03-
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IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Ninth Circuit affirmed the district court's jurisdiction over the Republic of Austria, a sovereign state, and its national museum, the Austrian Gallery, for a disputed expropriation claim that arose in 1948, twenty-eight years before enactment of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq*. ("FSIA"). The claim challenges the Republic's ownership of artwork that is and always has been located in Austria. Jurisdiction and venue in the Central District of California were asserted notwithstanding that (a) the claims in this case arose before the United States adopted the restrictive theory of sovereign immunity in 1952, at a time when Austria had an expectation of absolute immunity from private civil suit in United States courts; (b) the United States opposes a finding of jurisdiction in this case; (c) respondent did not exhaust her legal remedies in Austria; and (d) no part of the alleged events or omissions giving rise to the claim occurred in any judicial district in the United States, or concern any commercial activity here. In holding that the FSIA may be retrospectively applied to pre-1952 events, the Ninth Circuit's decision directly conflicts with the holdings of the Second, Eleventh and District of Columbia Circuits.

Three questions are presented:

1. Does the expropriation exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3), afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?

2. Can jurisdiction over a foreign state or its agency or instrumentality be asserted under the FSIA's expropriation exception when due process minimum contacts requirements have not been met, there has been no violation of international law because the claimant failed to exhaust her legal remedies in the foreign state, and the activity that is the basis for jurisdiction is the limited, non-commercial promotion of a not-for-profit national museum?

3. Can foreign states be sued in any district where a claimant resides, notwithstanding the provisions of 28 U.S.C. § 1391(f)(4) laying exclusive venue in the District of Columbia, when no substantial part of the events or omissions giving rise to the claim occurred in, and the property claimed is not situated in, the United States?

LIST OF PARTIES

The parties below are listed in the caption. In addition, the United States of America appeared as *amicus curiae* in support of petitioners the Republic of Austria and the Austrian Gallery. Bet Tzedek Legal Services appeared as *amicus curiae* in support of respondent Maria V. Altmann.

CORPORATE DISCLOSURE STATEMENT

The Republic of Austria is a sovereign state.

The Austrian Gallery is a scientific statutory body listed in the Austrian commercial register. It has no parent corporation. It issues no stock. No publicly held company has any ownership interest in the Austrian Gallery.

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002). The opinion was amended on April 28, 2003, 327 F.3d 1246 (9th Cir. 2003). The Ninth Circuit affirmed the May 7, 2001 decision of the United States District Court for the Central District of California, as amended on May 11, 2001, reported at 142 F. Supp. 2d 1187 (C.D. Ca. 2001). *See* Appendices A-D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit's opinion was rendered on December 12, 2002. Despite the filing by the United States of its *amicus curiae* brief in support of the Petition (see Appendix F), the Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* was denied on April 28, 2003. *See* Appendix D. The Ninth Circuit denied petitioner's Motion to Stay the Issuance of the Mandate on May 6, 2003. On May 13 and May 19, 2003, this Court granted petitioners' Application to Stay the Mandate (Sup. Ct. No. 02A952).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 United States Code, Section 1604.

Immunity of a foreign state from jurisdiction.

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the

jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Title 28 United States Code, Section 1605(a)(3).

General exceptions to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

. . .

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

The provisions of 28 U.S.C. § 1330, 28 U.S.C. § 1391(f) and 28 U.S.C. § 1603 are lengthy and, therefore, set out in Appendix E, pursuant to Supreme Court Rule 14.1(f). Relevant excerpts of the FSIA's legislative history are set out in Appendix G, pursuant to Supreme Court Rule 14.1(h)(vi).

STATEMENT OF THE CASE

1. Respondent Maria V. Altmann asserts in this case that five paintings by Gustav Klimt (the "Paintings") were expropriated from her family by the Republic of Austria over fifty-five years ago. The Paintings, which are owned by the Republic and have been displayed with Altmann's knowledge at the Austrian Gallery continuously since 1948, are national treasures and part of the cultural heritage of the Austrian people.

Altmann brings her claim as one of several residual heirs to the estate of her uncle, Ferdinand Bloch-Bauer, who passed away in Europe in 1945 after the War. Ferdinand's will made no mention of the Paintings, but left the residue of his estate to Altmann and two of her siblings. Although Altmann emphasizes that the Paintings were confiscated from her uncle by Nazi Germany during World War II, the Republic's ownership of the Paintings rests on events that occurred *before* and *after* (but not during) World War II. [1]

The gravamen of Altmann's claim here is that the Paintings were allegedly expropriated by the Republic after the War, in 1948, by the discriminatory withholding of export permits for other family property. The Republic denies that the Paintings were acquired in this way. Years before the 1938 Nazi occupation of Austria, Altmann's aunt (Ferdinand's wife), Adele Bloch-Bauer, bequeathed these works of art to the Republic. Adele Bloch-Bauer died in 1925. Ferdinand subsequently acknowledged Adele's bequest and agreed – years before the Nazi occupation – that the Paintings would be delivered to the

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1. Altmann's Complaint seeks return of six paintings. She claims that five of the paintings were expropriated in 1948. Altmann concedes that the sixth painting, *Amalie Zuckerkandl*, was not expropriated by the Republic in 1948, but donated to the Gallery by a third party in 1988. Altmann offers no argument to support the exercise of jurisdiction with regard to the *Zuckerkandl* painting.

Austrian Gallery upon his death. The Paintings were illegally confiscated by the Nazis in 1938-1942, and recovered after the War by Austrian and Allied personnel, with the help of one of Altmann's brothers, and turned over to the Austrian Gallery.

Upon Ferdinand's death after World War II, with the assent of *another* one of Altmann's brothers, and with written powers of attorney from Altmann and other family members, Altmann's family attorney in 1948 acknowledged in writing the Republic's ownership of the Paintings. The Republic maintains that this acknowledgment was made independent of any consideration over export permits for other property, and that under Austrian law, the Paintings belong to Austria irrespective of the Nazi seizures during the period of Austria's occupation or Altmann's allegations concerning the withholding of export permits in 1948.[2]

Altmann contests the legal effectiveness of Adele's bequest and Ferdinand's ratification of it under Austrian probate law. Altmann initially brought her claims in Austria before bringing this action – first to the Advisory Board commission ("Advisory Board") empowered by Austrian statute to consider art restitution claims of Holocaust survivors and other Nazi victims, and then to Austrian courts. Altmann's claim to the Paintings was rejected in 1999 by the Advisory Board, after its review of the facts and applicable law.[3]

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2. Following World War II, the Republic restituted to Altmann and her family a number of other valuable works of art and other family holdings seized by the Nazis which, unlike the Klimt Paintings, were not bequeathed to the Republic before the War by Adele or Ferdinand Bloch-Bauer.

3. The Advisory Board consists of government ministers, museum officials and art historians appointed under the Austrian Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections (the "Act"), enacted in 1998. The Act authorizes the Minister of Finance to receive and investigate claims and to return works

(Cont'd)

In June 1999, the Board determined that some of the artwork included in the claim by Altmann and her family should be returned to them. On the Board's recommendation, the Republic restituted approximately one million dollars worth of porcelain and Klimt drawings to Altmann and her family that had been allegedly obtained through the use of improperly withheld export permits. However, the Board concluded that ownership of the Paintings at issue here had passed to Austria pursuant to Adele Bloch-Bauer's 1923 will and Ferdinand's actions after her death in 1925. Altmann and her family initiated litigation in Austria challenging the Advisory Board's decision. They later abandoned that action and Altmann, alone, initiated this action in the United States.

2. Altmann filed her Complaint in the United States on August 22, 2000. On February 5, 2001, petitioners filed their Motion to Dismiss under Federal Rules of Civil Procedure, Rule 12(b) (the "Motion"). The district court entered its Order on May 7, 2001, as amended May 11, 2001, denying the Motion in its entirety and certifying for review all issues raised by petitioners not immediately appealable under the collateral order doctrine.

3. Petitioners filed their Notice of Appeal on June 5, 2001. The Ninth Circuit's decision was entered on December 12, 2002. Petitioners timely filed their Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* on January 2, 2003.

(Cont'd)

of art in circumstances such as those alleged by Altmann. The Act is considered a model for art restitution under the Washington Principles, a 1998 written agreement by forty-four countries, including the United States and Austria, establishing non-binding principles for the return of Nazi-looted art. Stuart E. Eizenstat, "Imperfect Justice, Looted Assets, Slave Labor, and the Unfinished Business of World War II" (Public Affairs, 2003), at 195-199. Based on the Advisory Board's recommendations, the Republic has returned over 2,000 valuable works of art to Holocaust survivors and other victims of the Nazi regime – including to Altmann and her family. Eizenstat, at 200.

The United States filed its *amicus curiae* brief in support of the Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* on January 17, 2003. On April 28, 2003, the Ninth Circuit denied the Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* and amended its December 12, 2002 decision. The Ninth Circuit denied petitioner's Motion to Stay the Issuance of the Mandate on May 6, 2003. On May 13, 2003, this Court granted petitioners' Application to Stay the Mandate.

REASONS FOR ALLOWANCE OF THE WRIT

Whether the expropriation exception of the FSIA, 28 U.S.C. § 1605(a)(3), should be applied to pre-1952 events is an important question, implicating the United States' relationships with other nations, on which the circuit courts are split, and on which this Court's guidance is urgently warranted. The Ninth Circuit's upholding of jurisdiction against the Republic of Austria and its national gallery, which conflicts in various respects with the holdings of two other circuits, disregards at least two concerns recognized by this Court as deeply embedded in American jurisprudence: sovereign immunity and the strong policy against retroactive application of Congressional statutes. By ignoring the position of the United States that jurisdiction should not be asserted in this case, the Ninth Circuit also wholly disregarded the long-given deference to the Executive Branch in matters touching on foreign affairs, as recently applied by this Court to World War II-era restitution claims in *American Insurance Association v. Garamendi*, 539 U.S. __, 2003 WL 21433477 (June 23, 2003).

Four Circuit Courts of Appeal, including the Ninth Circuit in this case, have considered whether the FSIA's exceptions to absolute sovereign immunity should apply to events preceding 1952, specifically, to World War II events. When it rendered its decision in this case, the Ninth Circuit had the benefit of, but disregarded, prior decisions of the Second and Eleventh Circuits, which held that the FSIA may not be applied to pre-1952 events (as well as the District of Columbia Circuit's affirmance, with

the participation of then-Judge Ginsburg, of at least one district court case that agreed with the Second and Eleventh Circuits). On June 27, 2003, the District of Columbia Circuit expressly agreed with the Second and Eleventh Circuits that the FSIA would have an impermissible retroactive effect if used as the jurisdictional basis for civil suits seeking damages for Japan's World War II era war-crimes. Another action – also against the Republic of Austria – is pending in the Second Circuit in which this issue is also central.[4]

The Ninth Circuit's decision in this case stands alone among the Circuits in holding that a foreign state did not have an expectation of sovereign immunity before 1952. The Ninth Circuit concluded erroneously that, because some of the Paintings at issue were looted by Nazi Germany during World War II, Austria could not have expected sovereign immunity in American courts for separate conduct in 1948, notwithstanding the position taken by the United States in its *amicus curiae* brief that Austria and *all* other foreign states had an expectation of absolute immunity before 1952, even during and after World War II.

The split among the Circuits that have ruled on whether the FSIA applies to pre-1952 events requires resolution. In addition, the international ramifications of the Ninth Circuit's decision are significant. Left undisturbed, it will affect the willingness of foreign nations, including the Republic of Austria, to engage in cultural and consular activities in the United States, for fear of being haled into court for events that occurred at least a half-century ago based on those present-day sovereign contacts.

As well, the exercise by United States courts of jurisdiction over foreign sovereigns in such cases is likely to affect the viability of treaties already reached and yet to be concluded for the resolution of World War II era claims, and spawn, in an

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4. These cases are discussed *infra*, in Section I.B.

escalating fashion, ever broader assertions of jurisdiction by the courts of foreign nations over the United States and its cultural institutions.

Review by this Court also is necessary to address two additional important issues posed by the Ninth Circuit's decision. First, contrary to this Court's prior assumption and the holdings of other courts – including prior holdings of the Ninth Circuit – the Ninth Circuit held that personal jurisdiction over foreign nations may be exercised without regard to due process minimum contacts standards. Second, despite the plain language of 28 U.S.C. § 1391(f), which lays venue in suits against foreign states in cases such as this only in the District of Columbia, the Ninth Circuit misread and misapplied 28 U.S.C. § 1391(f)(3) to hold venue proper in Los Angeles, holding contrary to the construction of other Circuits (including the District of Columbia) of what constitutes "doing business" for venue purposes.

The Ninth Circuit's disregard for the sovereign immunity of a foreign nation here, and for the various laws enacted by the political branches to protect foreign nations, is in considerable tension with the concern for sovereign immunity, the presumptive non-retroactivity of statutes and due process this Court has repeatedly expressed. Review of this case is essential to decide whether cases such as this, which seek redress for claims over a half-century old, involving foreign property, against nations that are friendly to the United States, are properly brought under the FSIA (and anywhere a claimant happens to reside in the United States), contrary to the urging of the United States in this and other cases.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF THE FSIA TO EVENTS BEFORE 1952.

A. Application Of The FSIA To Pre-1952 Events Conflicts With The Presumptions In Favor Of Sovereign Immunity And Against Retroactivity Of Congressional Statutes.

The FSIA, enacted by Congress in 1976, codifies the "restrictive theory" of sovereign immunity, adopted by the State Department in 1952 in what is known as the Tate Letter. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). Under the "restrictive theory" embodied in the FSIA, sovereign immunity extends to all cases except those that arise from the state's strictly commercial conduct. *Id.* at 487. In *Verlinden*, this Court held that the FSIA is more than a jurisdictional statute, in that it "does not merely concern access to the federal courts [but also] codifies the standards governing sovereign immunity law *as an aspect of substantive federal law*." *Id.* at 496-497 (emphasis added).

The Supreme Court has recognized that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident." *Verlinden*, 461 U.S. at 493.

This Court also repeatedly has held that the "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001). In *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997), the Court reaffirmed *Landgraf*, and clarified that "a statute [that speaks to the substantive rights of the parties], even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other." *Id.* at 951. And, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), in holding the Coal Industry Retiree Health Benefit Act of 1992 unconstitutional,

in part, because Congress made it retroactive to 1950, this Court stated that "[t]he distance into the past that the Act reaches back to impose liability . . . and the magnitude of that liability raise substantial questions of fairness." *Id.* at 534.

The Ninth Circuit's holding that the FSIA's expropriation exception may reach back over fifty-five years (and beyond) to pre-1952 events runs counter to the essential presumption that "[a] foreign state is normally immune from the jurisdiction of federal and state courts," *Verlinden*, 461 U.S. at 488, to this Court's holdings in *Landgraf* and its progeny, and to the considerations of fairness and common sense that this Court has deemed essential to proper statutory construction. The Ninth Circuit's disregard for these principles presents a substantial issue justifying Supreme Court review.

B. The Ninth Circuit Conflicts With Other Circuits In Holding That The FSIA Dispenses With Sovereign Immunity For Claims Based On Events Prior To 1952.

The Ninth Circuit's decision squarely conflicts with the holdings of other courts that have decided that the FSIA may not be applied to events that occurred before 1952. *Joo v. Japan*, __ F.3d __, *7 (D.C. Cir. June 27, 2003) ("a foreign sovereign justifiably would have expected any suit in a court in the United States [before 1952] – whether based upon a public or a commercial act – to be dismissed unless the foreign sovereign consented to the suit"); *Carl Marks & Co. v. U.S.S.R.*, 841 F.2d 26, 27 (2d Cir.), *cert. denied*, 487 U.S. 1219 (1988) (the FSIA "is inapplicable to claims arising before the State Department issued the 'Tate Letter' in 1952"); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987) ("to give the [FSIA] retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)"). *Accord Cruz v. United States*, 219 F. Supp. 2d 1027, 1035-36 (N.D. Cal. 2002);

Garb v. Republic of Poland, 207 F. Supp. 2d 16 (E.D.N.Y. 2002); *Djordjevich v. Bundesminister Der Finanzen, Federal Republic of Germany*, 827 F. Supp. 814 (D.D.C. 1993), *aff'd on other grounds*, 124 F.3d 1309 (D.C. Cir. 1997) (unpublished); *Slade v. United States of Mexico*, 790 F.2d 163 (D.C. Cir. 1986) (per curiam, including Ginsburg, J.), *aff'g* 617 F. Supp. 351 (D.D.C. 1985), *cert. denied*, 479 U.S. 1032 (1987).[5]

The importance of Supreme Court resolution of the conflict created by the Ninth Circuit is not limited to this case. The retroactive application of the FSIA to Austria for pre-1952 conduct also is at issue in *Whiteman v. Federal Republic of Austria*, 02 3087 (2nd Circuit). Supreme Court review therefore will avoid the possibility of conflicting holdings concerning Austria's immunity for pre-1952 events. As in this case, and in *Joo*, *supra*, the United States filed an *amicus curiae* brief in *Whiteman* arguing against the assertion of jurisdiction.

C. The Ninth Circuit's Holding That Asserting Jurisdiction Is Not An Impermissible Retroactive Application Of The FSIA Warrants Review.

Pursuing the analysis required by *Landgraf*, the Ninth Circuit assumed *arguendo* that Congress intended no departure from the presumption against retroactivity, but nevertheless held that the application here had no impermissible retroactive effect.

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5. In its recent holding in *Joo*, at * 8, the District of Columbia Circuit rejected the dictum in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) that the FSIA might not have an impermissible retroactive effect if applied to pre-1952 events. *See also Abrams v. Societe Nationale Des Chemins De Fer Francais*, __ F.3d __, 2003 WL 21362345 (2d Cir. June 13, 2003) (holding that Congress did not intend that the FSIA be applied retrospectively). The Second Circuit in *Abrams*, however, vacated and remanded to develop a factual record as to whether commercial corporations wholly owned by foreign states were entitled to absolute immunity before 1952. *Abrams*, at *15. Unlike *Altmann*, *Joo*, *Carl Marks* and *Jackson*, the expectation of absolute immunity of *foreign states* before 1952 was not at issue in *Abrams*.

(App. A at 18a-19a.) That holding conflicts with holdings of this Court, the legislative history of the FSIA, the history of sovereign immunity in the United States, and with the position of the Executive Branch in a matter touching on foreign relations and, as such, warrants review.[6]

The FSIA's expropriation exception, embodied in section 1605(a)(3), significantly departs from the law of sovereign immunity as it existed before the United States adopted the restrictive theory of sovereign immunity in 1952. If applied retrospectively to pre-1952 events, the FSIA would impair the right of foreign states to absolute immunity in United States courts for expropriations; increase – indeed, create – liability of foreign states for past expropriations; and impose new duties on foreign states with respect to transactions already completed. *Landgraf*, 511 U.S. at 280.

Until 1952, the United States granted foreign sovereigns absolute immunity from suit in the courts of this country. *Verlinden*, 461 U.S. at 486. The pre-FSIA law concerning foreign expropriation is clearly reflected by this Court's holding in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), that, under the act of state doctrine:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a

6. The doubt expressed by the Ninth Circuit over congressional intention was wholly unwarranted. Every other circuit court that has ruled on this issue has held that Congress did not expressly provide that the FSIA should be applied retrospectively. *Joo*, at *11 ("[w]e find no clear indication Congress intended 28 U.S.C. § 1605(a)(2) to apply to events occurring prior to 1952"); *Abrams*, 2003 WL 21362345 at *11 ("[u]nder *Landgraf*, the first question is whether Congress clearly expressed its aim that the statute apply to pre-enactment events. We conclude it did not"); *Carl Marks*, 841 F.2d at 27 ("nothing in [the FSIA's] language or legislative history indicates that . . . wholesale reactivation of ancient claims was intended"); *Jackson*, 794 F.2d at 1497 ("both Senate and House Reports state that FSIA was not intended to affect the 'substantive law of liability'") (citations omitted).

> foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other ambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Id., at 428. *See also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706, n. 18 (1976) ("[i]t cannot be gainsaid . . . that the proper application of each [the doctrines of sovereign immunity and act of state] involves a balancing of the injury to our foreign policy, the conduct of which is committed primarily to the Executive Branch"); *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (recognizing that sovereigns enjoyed immunity to suits challenging "strictly political or public acts . . . such as nationalization").[7]

Before the enactment of the FSIA, once the State Department recognized a foreign state's immunity, federal courts presumed that "our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." *Ex Parte Republic Of Peru*, 318 U.S. 578, 588-589 (1943) ("courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations").

7. Congress in 1964 enacted legislation limiting *Sabbatino*, but reinforced the expectations of foreign states that they would not be subject to suit in the United States for expropriations that took place before 1952. For expropriations that took place *after* January 1, 1959, *but not otherwise*, the post-*Sabbatino* statute prohibited United States courts from declining jurisdiction for expropriations in violation of international law under the act of state doctrine, unless the President determined that the doctrine was required in a particular case. 22 U.S.C. § 370(e)(2).

The holding below conflicts with those decisions. The Ninth Circuit cited no case, because there is none, in which the State Department before 1952 recommended that Austria was not entitled to the absolute immunity enjoyed by all other nations in the United States. Moreover, there is no reported decision known to petitioners in which personal jurisdiction was asserted over the Republic of Austria, or any other foreign state, for an expropriation claim before 1952.

The decision below conflicts with prior decisions in another important respect that warrants this Court's review. *Verlinden* and other prior decisions help to protect the "settled expectations" of foreign nations by directing courts to accord significant weight to the position of the Executive Branch. *See Verlinden*, 461 U.S. at 486 ("this Court consistently has deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"); *Alfred Dunhill*, 425 U.S. at 705 (rejecting application of the act of state doctrine for purely commercial acts of foreign states, based on the Executive Branch's adoption of the restrictive theory of sovereign immunity in 1952); *Garamendi*. Here, however, without even mentioning the position of the Executive Branch and the documented history that it presented, the Court of Appeals reached a directly contrary conclusion.

The Executive Branch's *amicus curiae* brief in the Ninth Circuit made clear that no exception to sovereign immunity existed prior to 1952 for expropriations of property. (*Amicus* at 4 ("the United States did not recognize an expropriation exception to sovereign immunity prior to 1952").) The United States also agreed that the FSIA's expropriation exception should not be applied to the Republic or the Gallery. (*Amicus* at 5.) The government confirmed that Austria was not an "unfriendly" nation during World War II. Under the Declaration of Moscow of November 1, 1943, the Allied Powers

recognized Austria as an occupied country and, hence, not a belligerent nation: "The United States was not at war with the State of Austria. To the contrary, the United States took the view that Austria was the first country to be occupied by Nazi Germany." (*Amicus* at 6.) *See also* Dept. of State Bulletin Vol. XV, No. 384, November 10, 1946, at 865 ("[t]he United States has accordingly regarded Austria as a country liberated from forcible domination by Nazi Germany, and not as an ex-enemy state or a state at war with the United States during the second World War").

The Ninth Circuit's finding that Austria had no expectation of sovereign immunity in 1948 because the State Department after World War II adopted "a policy to remove obstacles to recovery for victims of Nazi expropriations," (App. A at 16a), is contrary to this Court's historical findings in *Garamendi*. This Court recognized in *Garamendi* that, after the cessation of hostilities in World War II, "confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy soon after the war." *Garamendi*, 2003 WL 21433477 at *5. The western allies soon deferred the issue of reparations, however, when they moved to end their post-war occupation to reestablish Germany and the occupied countries as buffers against Soviet expansion. *Id.* at *6.[8]

Between 1945 and 1949, Austria enacted at least six restitution statutes providing for the return of property located

8. Among other glaring errors, the Ninth Circuit erroneously relied in its April 28, 2003 amended opinion on the Allies' Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory for the proposition that the United States would have recommended against sovereign immunity in our courts immediately after World War II. (App. D at 94a.) However, that document specifically provided that the authority to decide the rightful owners of forced transfer property fell to the legitimate post-war government of the territory in which the property was located. Declaration at ¶ 5.

in Austria to victims of Nazi Germany. During this time, the protection of Austrian sovereignty by the United States was one of the first diplomatic battles of the Cold War. From 1946 to 1955, the United States continuously pressed the Soviet Union to end its occupation of Austria, and to fully recognize Austria's sovereignty, as the western allies already had done. *See, e.g.*, Adelman and Sorrels, "The Vienna Peace Treaty: Lessons For U.S. Negotiators" (1985), 131 Cong. Rec. H4334-04 (the "diplomatic battle [over Austria] was to run nearly a decade [from 1946] before yielding . . . success for the West"). In so doing, the United States was intent on countering Soviet designs on Europe after World War II. *Id. See also Garamendi*, 2003 WL 21433477 at *6.

Given the Cold War history, it is inconceivable that the United States would have advocated in 1948 that Austria not enjoy sovereign immunity in United States courts – especially on the subject of reparations, which was at the heart of the Soviet Union's belligerence toward Austria at the time. Subjecting Austria to United States civil suits at that time would have interfered with the United States' determined foreign policy of supporting the emerging post-war democracies, holding back Soviet expansion and referring all wartime restitution claims to their countries of origin. *Garamendi*, 2003 WL 21433477 at *14 (the issue of restitution "has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century . . . just as it was addressed in agreements soon after the Second World War").

As the United States advised the Ninth Circuit after the panel's original decision was handed down, "[t]he panel's belief that the Executive Branch had in fact adopted a policy after the war to deny Germany and Austria immunity from Nazi-era claims rests upon a misreading of the historical evidence." (*Amicus* at 10.)

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF THE MINIMUM CONTACTS ANALYSIS TO THE FSIA, AND TO CONFIRM THE REACH OF THE EXPROPRIATION EXCEPTION.

A. The Ninth Circuit's Decision Creates A Conflict As To Whether Foreign States Are Entitled To Due Process Protection For Purposes Of Asserting Personal Jurisdiction.

The Ninth Circuit's holding that it was not required to apply a due process minimum contacts analysis under the FSIA, (App. A at 26a), cannot be reconciled with the Second Circuit's holding in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), that the "safeguards of due process, which otherwise regulate every exercise of personal jurisdiction," must apply to foreign states under the FSIA, or this Court's assumption that foreign states are "persons" under the Due Process Clause of the Fifth Amendment. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).[9]

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9. Remarkably, the Ninth Circuit's decision here also conflicts, without acknowledgment, with 18 years of its prior decisions that the exercise of personal jurisdiction over foreign states must comply with due process-minimum contacts requirements. *See, e.g., Theo. H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969 (9th Cir. 1998) (the FSIA's long arm section is subject to due process minimum contacts limitations); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 704 n. 4 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) ("the exercise of personal jurisdiction also must comport with . . . due process"); *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989) ("a court must consider whether the constitutional constraints of the Due Process Clause preclude the assertion of personal jurisdiction over [foreign states]"); *Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1255 (9th Cir. 1980) ("[p]ersonal jurisdiction under the [FSIA] requires satisfaction of the traditional minimum contacts standard").

Since *Weltover*, two other Circuits have applied a due process minimum contacts analysis. *See, e.g., S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303-1304 (11th Cir. 2000); and *Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 134 (2d Cir. 1998).[10]

Whether foreign states are "persons" under the Due Process Clause need not be decided by this Court in this case, because Congress plainly intended such protection for purposes of establishing jurisdiction under the FSIA. The legislative history of 28 U.S.C. § 1330, which authorizes personal jurisdiction over claims permitted by the FSIA, confirms that Congress intended that the "requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision," citing to *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). H.R. Rep. No. 94-1487 at 13-14, 94th Congress, 2d Session (1976). (App. G at 123a.) According to the legislative history, section 1330 was "patterned after the long-arm statute Congress enacted for the District of Columbia," and that statute afforded jurisdiction only where minimum contacts were present. *Id.*[11]

10. The Courts in *S & Davis* and *Hanil* were reluctant to find that foreign states are "persons" under the Due Process Clause because of this Court's reference in *Weltover* to its decision in *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966), that States of the Union were not "persons" under the Due Process Clause. *Weltover*, however, declined to apply the holding in *Katzenbach* to foreign states. *See also Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1476 (9th Cir. 1995) ("Congress did not intend the FSIA to subject foreign states . . . to the same liability that the [U.S.] government faces in [U.S.] courts"). The confusion among the Circuits concerning the holding in *Weltover* is another reason for this Court to grant review.

11. Hence, although the term "a commercial activity" in the expropriation exception may denote a single commercial transaction, 28 U.S.C. § 1603(d), it must nevertheless conform to due process (Cont'd)

The conflict over the applicability of due process minimum contacts analysis here is of more than abstract interest. If those principles do apply, jurisdiction cannot be sustained. The Ninth Circuit's minimum contacts analysis, which it conducted despite its holding that foreign states are not entitled to due process protection, disregards the minimum contacts standards intended by Congress, and is incompatible with precedent established by this Court.

The Ninth Circuit held that the minimum contacts test was satisfied against *both* the Republic and the Gallery because of the *Gallery's* alleged participation in the publication and marketing of a book and a museum guidebook in the United States, fifty years *after* the alleged expropriation of the Paintings. (App. A at 26a-27a.) These two attenuated contacts by only *one* of the petitioners do not justify the assertion of personal jurisdiction over either of them and, certainly, not against the Republic.[12]

(Cont'd)
minimum contacts requirements. *International Shoe*, 326 U.S. at 318 ("some single or occasional acts" related to the forum may not be sufficient to establish jurisdiction if "their nature and quality and the circumstances of their commission" create only an "attenuated" affiliation with the forum). By analogy, the "transacting any business" provisions of state long-arm statutes, including the District of Columbia statute upon which the FSIA was modeled, D.C. Code § 13-423(a)(1), permit the exercise of personal jurisdiction only "to the extent permitted by the due process clause." *Environmental Research International, Inc. v. Lockwood Greene Engineers, Inc.*, 355 A.2d 808, 810-11 (D.C.App. 1976).

12. At first, the Court of Appeals found that the Republic's "operation of consulates, sponsorship of tourist relations and trade, and promotion of Austrian business interests" were "substantial, systematic and continuous contacts with the United States." (App. A at 29a.) However, the court then stated that "[w]e do not hold that these contacts are enough to support general jurisdiction." *Id.* The Ninth Circuit concluded that these contacts supported a finding of specific jurisdiction (Cont'd)

The alleged wrongful conduct, expropriation of the Paintings, did not arise out of the present-day "commercial" activities of the Gallery, or the Republic. Nor did the wrongful conduct arise from the Republic's consular or other cultural activities. Indeed, the record is barren of *any* jurisdictional contacts by Austria in the United States in 1948.[13]

Moreover, the Ninth Circuit's assertion of personal jurisdiction over the Republic, based on the alleged commercial acts of the Gallery, cannot be reconciled with the presumption of separateness long recognized by this Court. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983) ("duly created instrumentalities of a foreign state are to be accorded a presumption of independent status in determining jurisdiction").[14]

(Cont'd)
– not of themselves – but "based on the Gallery's publication of books and advertisements featuring the Klimt works." *Id.* These two contacts of the Gallery are the only ones which, according to the Ninth Circuit, justify personal jurisdiction against both the Gallery and the Republic, and are the same two jurisdictional contacts that formed the basis for the Court of Appeals' subject matter jurisdiction analysis under the FSIA. (App. A at 25a-26a).

13. *See Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 109 (1987) ("minimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'"); *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987) ("the fair warning that due process requires arises not at the time of the suit, but when the events that gave rise to the suit occurred").

14. Similarly, Altmann may not rely on the commercial activities of the Republic or of its other agencies or instrumentalities in the United States to establish commercial activity of the *Gallery*. *See, e.g., Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 948 F.2d
(Cont'd)

The assertion of personal jurisdiction in this case "offend[s] traditional notions of fair play and substantial justice." *Asahi*, 480 U.S. at 113. Indeed, petitioners are unaware of any case finding jurisdiction on the basis of contacts with the United States as *de minimis* as those here. The Gallery's insubstantial contact with the United States as alleged in the Complaint is greatly outweighed by, among other things, the conflict with Austria's sovereignty, the burdens of litigating this matter under Austrian law in the United States, and Austria's compelling interest in having this action litigated before Austrian courts.[15]

The Ninth Circuit's assertion of personal jurisdiction over a foreign state and its national museum in this case was cavalier and irreconcilable with the essential principles of due process and fair play long-recognized by this Court. Review by this Court therefore is essential to confirm that if, under the FSIA, foreign states are to be treated as other commercial actors, then they deserve, at the very least, the same due process protections that apply to commercial litigants in our courts.

(Cont'd)
90, 97 (2d Cir. 1991), *vacated on other grounds*, 505 U.S. 1215 (1992), *aff'd on reh'g*, 999 F.2d 33 (2d Cir. 1993) ("it would be inappropriate to attribute [a principal's] commercial activity in the United States to [its agent] for purposes of establishing subject matter jurisdiction under the FSIA").

15. *See Asahi*, 480 U.S. at 114 ("[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders"); *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993) (defendants' publication of one article distributed in the United States was minimal forum-related activity, was outweighed by the availability of Sweden as an alternative forum, and litigation in the United States would conflict with Swedish sovereignty).

B. Review Is Necessary To Resolve The Reach Of The FSIA's Expropriation Exception.

This case raises two additional issues of first impression to this Court, each independently dispositive, that are central to the sovereignty of foreign states, and thus worthy of review: (1) can there be a violation of international law under the expropriation exception when the claimant fails to exhaust her legal remedies in the foreign state; and (2) does the limited promotion of a non-profit national museum by a foreign state constitute a commercial act under the FSIA.

1. The FSIA Requires A Violation Of International Law Before Jurisdiction Is Asserted Under The Expropriation Exception.

The FSIA's expropriation exception requires that the property at issue was "taken in violation of international law." 28 U.S.C. § 1605(a)(3). Lower courts have held that a violation of international law requires that "the State where the violation has occurred should have an opportunity to redress takings by its own means, within the framework of its own domestic legal system." *Greenpeace, Inc. (U.S.A.) v. State of France*, 946 F. Supp. 773, 783 (C.D. Ca. 1996). Thus, a "taking" in violation of international law has not occurred when a plaintiff does not exhaust local remedies before an independent judicial system. *Millicom Int'l Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998). *Cf. Parratt v. Taylor*, 451 U.S. 527, 543 (1981) (property not taken in violation of due process of law where available procedures are not pursued), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986).

The Ninth Circuit disregarded the exhaustion of remedies requirement – indeed, never mentioned it in connection with its FSIA analysis. (App. A at 24a-26a.) And yet, in its application

of the doctrine of *forum non conveniens* to this case, the Ninth Circuit acknowledged that Altmann failed to exhaust her remedies in Austria. (App. A at 33a.)

The assertion of jurisdiction over a foreign state, particularly a democratic republic such as Austria, when the claimant has not availed herself of all legal remedies there, is irreconcilable with the requirements of the FSIA, as well as the long-recognized principles of grace and comity between nations. *See Verlinden*, 461 U.S. at 486.

2. The Limited Promotion Of Foreign National Museums Is Not Commercial Activity Under The FSIA.

The Ninth Circuit's assumption that the Gallery's activities were "commercial" also conflicts with settled precedent by this Court. *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-62 (1993); *Weltover*, 504 U.S. at 614 (commercial activities are those acts through "which a private party engages in trade or commerce").

The museum publications relied on by the Ninth Circuit were undertaken to promote the Gallery as a non-profit academic and educational institution. *See Letelier v. Republic of Chile*, 748 F.2d 790, 796 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) ("courts should not deem activity 'commercial' as a whole simply because certain aspects of it are commercial"); *Aschenbrenner v. Conseil Regional de Haute-Normandie*, 851 F. Supp. 580, 584-86 (S.D.N.Y. 1994) (art exposition was essentially educational and cultural and therefore not commercial in nature).[16]

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16. Both publications are, indeed, typical of the types of catalogues and brochures generated by museums around the world. In fact, the Ninth Circuit acknowledged that the publication "Klimt's Women" was published "in conjunction with a large exhibition at the Gallery featuring the expropriated paintings," and that both books were intended to attract tourists to the Gallery. (App. A at 25a.)

Congress, in fact, expressly declared that, as a matter of national policy, museums are educational institutions. 20 U.S.C. § 1221-2. Further, under the United States Immunity from Seizure Act, works of art are immune from seizure if they are loaned to an exhibition which is not conducted for profit. *See* 22 U.S.C. § 2459. Art museums also are granted tax exempt status under the Internal Revenue Code precisely because they are not a "commercial enterprise." *See, e.g.*, Internal Revenue Code § 501(c)(3) and 26 Code of Federal Regulations § 1.501(c)(3)- 1(d)(3)(ii) (example 4).

The Ninth Circuit failed to take into account the non-commercial nature of the Gallery's two alleged activities in the United States. Review is necessary so that this Court may remedy the Ninth's Circuit's error and bring certainty to the proper reach of the FSIA.

III. REVIEW IS NECESSARY TO RESOLVE AN IMPORTANT DISPUTE CONCERNING THE PROPER VENUE OVER FOREIGN STATES.

The Ninth Circuit's decision creates a conflict among the Circuits in the application of the federal venue statute to foreign states.

The federal venue statute governing actions against foreign states, 28 U.S.C. § 1391(f), plainly provides that when the substantial part of the events or omissions giving rise to the claim did not occur in, and the property is not situated in, any judicial district, venue is proper only in the District of Columbia. *Compare* 28 U.S.C. § 1391(f)(4) *with* 1391(f)(1), (2), and (3). Where the special factors delineated in subsections 1391(f)(1), (2), and (3) do not weigh in favor of an out-of-the-District of Columbia forum, Congress made plain that the nation's capital is the only forum for suing foreign nations and their agencies and instrumentalities. It is there "that foreign states have

diplomatic representatives and where it may be easiest for them to defend." H.R. Rep. No. 94-1487, 94th Congress, 2d Session, at 32 (1976). (App. G at 128a.) *See also Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 15 n. 6 (D.D.C. 1998) (noting that the district court for the District of Columbia is "the dedicated venue for actions against foreign states").

The Ninth Circuit held venue over the Republic of Austria to be proper in California based on its incorrect finding that the *Gallery* is "doing business" there, under § 1391(f)(3). (App. A at 31a.) Premising venue for the claim against the Republic on that basis was plain error. Section 1391(f)(3) provides for venue in the narrow category of cases "brought against an agency or instrumentality of a foreign state, as defined in . . . section 1603(b)." H.R. Rep. No. 94-1487, 94th Congress, 2d Session, at 32 (1976) (App. G at 127a.) *See also Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 152 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995) (holding that section 1391(f)(3) is "of doubtful coherence if extended beyond the category of commercial enterprises").

Moreover, § 1391(f)(3) was not only an incorrect basis for venue over the Austrian Republic; it was equally incorrect to warrant venue over the Gallery. It permits venue in a district in which the alleged agency or instrumentality is either "licensed to do business or is doing business." 28 U.S.C. § 1391(f)(3). However, there was here no allegation that the Gallery is licensed to do business in the Central District of California (and it is not). Nor was it "doing business." Every other circuit that has interpreted the term "doing business" for purposes of venue has held that the term requires more than one particular transaction or commercial act. Under either of the accepted tests that have emerged from the other circuits, the Gallery is not "doing business" in the Central District of California.[17]

17. *Compare Du-Al Corp. v. Rudolph Beaver, Inc.*, 540 F.2d 1230, 1233 (4th Cir. 1976); *Fraley v. Chesapeake & O.R. Co.*, 397 F.2d 1, 4 (Cont'd)

Thus, certiorari is warranted to resolve a split between the Ninth Circuit and the other circuits as to whether the exclusive venue in the District of Columbia afforded by 1391(f)(4) may be avoided by treating foreign nations as "agencies" or "instrumentalities" under 1391(f)(3) and broadly considering "doing business" under that provision to mean any commercial contact, no matter how minimal, as the Ninth Circuit did in this case.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

DATED: June 27, 2003

Respectfully submitted,

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(Cont'd)
(3d Cir. 1968); *Houston Fearless Corp. v. Teter*, 318 F.2d 822, 826 (10th Cir. 1963) (the term "doing business" under former 28 U.S.C. § 1391(c) is equated with "minimum contacts" for personal jurisdiction); with *Maybelline Co. v. Noxell Corp.*, 813 F.2d 901, 905 (8th Cir. 1987); *Eli Lilly & Co. v. Home Ins. Co.*, 794 F.2d 710, 721 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1060 (1987); *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 954-55 (1st Cir. 1984) (under former 28 U.S.C. § 1391(c), the commercial contacts with the district should be of sufficient magnitude to qualify to "do business" there under state law).

APPENDIX

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED DECEMBER 12, 2002 AND AMENDED ON APRIL 28, 2003†

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 01-56003, 01-56398

Maria V. ALTMANN, an individual,

Plaintiff-Appellee,

v.

REPUBLIC OF AUSTRIA, a foreign state; and the Austrian Gallery, an agency of the Republic of Austria,

Defendants-Appellants.

Argued March 7, 2002.
Submitted May 24, 2002.
Decided Dec. 12, 2002.

Before: *WARDLAW, W. FLETCHER*, Circuit Judges and *WHYTE*,* District Judge.

WARDLAW, Circuit Judge.

At issue is whether the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, confers jurisdiction in the United

† Amendments appear in brackets [ ].

* The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

Appendix A

States District Court for the Central District of California over the Republic of Austria and the state-owned Austrian Gallery in a suit alleging wrongful appropriation of six Gustav Klimt paintings from their rightful heirs. Maria Altmann, a United States citizen, seeks the recovery of the paintings from the Republic of Austria, which now houses them in the Austrian Gallery. She alleges that (i) the Nazis took the paintings from her Jewish uncle to "Aryanize" them in violation of international law; (ii) the pre-World War II and wartime Austrian government was complicit in their original takings; (iii) the current government, when it learned of the heirs' rights to the paintings, deceived the heirs as to the circumstances of its acquisition of the paintings; and (iv) the Republic and the Gallery now wrongfully assert ownership over the paintings. The Republic of Austria appeals from the district court's denial of its motion to dismiss for want of jurisdiction. Rejecting the Austrian Republic's assertions, the district court found, *inter alia*, that the FSIA applied retroactively and generally to the events of the late 1930s and 1940s, and that the seizure of the paintings fell within the expropriation exception to the FSIA's grant of immunity.

For the reasons stated below, we determine that the exercise of jurisdiction in this case does not work an impermissible retroactive application of the FSIA. If true, the facts alleged by Altmann establish a taking in violation of international law that confers jurisdiction upon our federal courts, and thus Altmann has presented a substantial and nonfrivolous claim. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992) ("At the jurisdictional stage, we need not decide whether the taking actually violated international law; as long as a 'claim is substantial and nonfrivolous, it provides a sufficient basis for the exercise of our jurisdiction.' " (quoting *West v.*

Appendix A

Multibanco Comermex, S.A., 807 F.2d 820, 826 (9th Cir. 1987))), *cert. denied*, 507 U.S. 1017, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993). Because Appellants profit from the Klimt paintings in the United States, by authoring, promoting, and distributing books and other publications exploiting these very paintings, these actions are sufficient to constitute "commercial activity" for the purpose of satisfying the FSIA, as well as the predicates for personal jurisdiction. Finally, because the Republic of Austria "does business" in the Central District of California, venue is appropriate there and the principles of *forum non conveniens* do not counsel otherwise. Thus we uphold the district court's assertion of jurisdiction under the FSIA.

I. Background

In the early 1900s Ferdinand Bloch, a wealthy Czech sugar magnate, commissioned a portrait of his young wife, Adele Bloch-Bauer, by the Austrian painter Gustav Klimt. Adele and Ferdinand, members of the wealthy Viennese intellectual elite, commissioned Klimt's painting at a time when the artist commanded a fee in excess of a quarter of the price of a furnished country villa. Klimt made hundreds of sketches of Adele, culminating in 1907 with the shimmery golden portrait, *Adele Bloch-Bauer I.* Before Adele's untimely passing in 1925, she owned six Klimt paintings, including another portrait of herself, a portrait of a close friend, and three landscapes: *Adele Bloch-Bauer I & II*, *Amalie Zuckerkandl*, *Apple Tree I*, *Beechwood*, and *Houses in Unterach am Attersee.* Obviously oblivious to the terror to come, which would dramatically affect Austria generally and her husband Ferdinand intimately, Adele left a will "kindly" requesting that Ferdinand donate the paintings to the Austrian Gallery upon his death.

The Nazi invasion of Austria on March 12, 1938, worked a dramatic upheaval on the lives of Ferdinand and all Austrians. Many of the Austrians embraced the Nazis, moving Adolf Hitler to declare the *Anschluss*—the annexation of Austria to Nazi Germany—the next day. To imbue these actions with a quasi-legal basis, a mock Council of Ministers was convened, which adopted the resolution for the *Anschluss*. The legitimate Austrian cabinet leaders were arrested and deported to concentration camps. The country was split into single districts under the direct control of Berlin. Even the name "Austria" was abolished. Ferdinand, who was Jewish and had supported anti-Nazi efforts before the annexation of Austria, fled the country to avoid persecution, leaving behind all his holdings, including his paintings, a valuable porcelain collection, and his beautiful home, castle, and sugar factory. He settled in Zurich, Switzerland.

In the meantime, Nazi officials, accompanied by representatives of what later became the Austrian Gallery, convened a meeting to divide up Ferdinand's property. His sugar company was "Aryanized" and his Vienna home was reduced to a German railway headquarters. Reinhardt Heydrich, the author of the infamous Final Solution, moved into Ferdinand's castle. Ferdinand's vast porcelain collection was sold at a public auction, with the best pieces going to Vienna's museums. Hitler and Hermann Göring confiscated some of Ferdinand's Austrian Masters paintings for their private collections. Others were bought for Hitler's planned museum at Linz. Dr. Erich Fuerher, the Nazi lawyer liquidating the estate, chose a few paintings for his personal collection. Dr. Fuerher purported to give two of the paintings at issue, *Adele Bloch-Bauer I* and *Apple Tree I*, to the Austrian Gallery in 1941, in exchange for a painting donated by Ferdinand in 1936. He accompanied the transaction with a note

claiming to deliver the paintings in fulfillment of the last will and testament of Adele and signed it "Heil Hitler." In March 1943, Dr. Fuerher sold *Adele Bloch-Bauer II* to the Gallery and *Beechwood* to the Museum of the City of Vienna. He kept *Houses in Unterach am Attersee* for his personal collection. It is not clear what immediately happened to *Amalie Zuckerkandl*, although it ended up in the hands of the art dealer Vita Künstler.

Ferdinand died in Switzerland in November 1945. He left a will, revoking all prior wills, and leaving his entire estate to one nephew and two nieces, including Maria Altmann. Like Ferdinand, Altmann and her husband had been forced to flee Austria. When the Nazis invaded Austria, they imprisoned her husband Fritz in the labor camp at Dachau and moved Altmann to a guarded apartment. Her brother-in-law managed to get Fritz released from Dachau, after which they escaped to Holland. Ultimately, they ended up in Hollywood, California, where Altmann became a United States citizen in 1945.

Also in 1945, the Second Republic of Austria was born and the next year, it declared that all transactions motivated by the Nazis were void. Despite this official policy, Altmann and her family members were unsuccessful in recovering the Klimt paintings. Altmann's brother could retrieve only *Houses in Unterach* from the private collection of Dr. Fuehrer. In December 1947, the Museum of the City of Vienna offered to return the painting *Beechwood*, but only in exchange for a refund of the purchase price. This offer was rejected by Ferdinand's heirs. The heirs then unsuccessfully sought return of three of the paintings from the Gallery; the Gallery refused to transfer the paintings, asserting that they had been bequeathed to it by the terms of

Adele's will. Under color of the will, the legal effect of which has yet to be determined,[1] the museum even began to prepare suit for return of the Klimt paintings not yet in its possession. Despite the museum's aggressive stance, a private letter from Dr. Karl Garzarolli dated March 8, 1948, of the Gallery to his Nazi-era predecessor revealed that nothing in the files of the Gallery would document the donation of the paintings to the Gallery. This letter was kept hidden from Ferdinand's heirs.

In 1948, an agent of Austria's Federal Monument Agency contacted Dr. Rinesch, the Austrian lawyer hired by the family, to discuss the artworks in question. He informed Dr. Rinesch that the artworks could not be exported without resolution of their ownership. In a practice later declared illegal by the Austrian government, the Agency informed Dr. Rinesch that it would grant export permits on some of the family's other recovered artworks in exchange for a "donation" of the Klimt paintings. With little hope of otherwise exporting the other artworks, Dr. Rinesch agreed that Ferdinand's heirs would acknowledge the will of Adele Bloch-Bauer and allow the Austrian Gallery to keep the six Klimt paintings mentioned in the will. He justified this decision to Robert Bentley, Altmann's brother, by claiming that Adele's will would be sufficient to give the museum a claim to the six paintings. He executed a document, dated April 12, 1948, acknowledging the agreement and gave *Houses in Unterach* to the Austrian Gallery. As agreed, Dr. Rinesch obtained export permits for almost all of the other recovered artworks.

1. Altmann contends that under both Austrian and American law, precatory language such as that set forth in Adele's last will and testament kindly asking another to bequeath his property is unenforceable and ineffective to dispose of that property. To be effective, the will must contain a command or order as to the disposition of property.

In early 1998, an international art scandal broke: the City of New York seized two Egon Schiele paintings loaned by Austria to the Museum of Modern Art in New York, claiming that they were stolen by the Nazis. In response to allegations that the Austrian Gallery still possessed looted art, the Austrian Minister for Education and Culture for the first time opened up the Ministry's archives to permit research into the provenance of the national collection. The Austrian government also created a Committee made up of government officials and art historians to advise the Minister for Education and Culture on which artworks should be returned and to whom. The documents that surfaced in 1998 demonstrated that reliance on Adele's will as the source of legal title to the paintings was questionable at best.

Notwithstanding the discovery of the documents undermining the Austrian Gallery's ownership of the paintings, the Committee recommended against returning the six Klimt paintings at issue. Altmann alleges that the Committee vote was predetermined by the Austrian government before the Committee ever discussed the matter. Altmann points to the resignation of one Committee member who abstained from the vote and later stated that she had been ordered by a superior to vote against return of the six paintings.

In September 1999, Altmann decided to file a lawsuit in Austria to overturn the Committee's recommendation regarding the Klimt paintings. To do so, under Austrian law, Altmann was required to pay a filing fee that is a percentage of the recoverable amount. The standard formula used to calculate the court fees is 1.2% of the amount in controversy plus 13,180 Austrian schillings. Because the amount in controversy here is approximately $135 million, Altmann would have been required to pay about $1.6

million to pursue her claim.[2] Altmann applied for legal aid, seeking reduction of the fees, and was granted a partial waiver. Based on the information detailing her assets, the court determined that Altmann and her co-heirs could afford a fee of 2 million schillings, or approximately $135,000. Although Altmann did not appeal the decision, the Republic of Austria appealed on the grounds that Altmann had not declared the value of various art objects worth almost $700,000 that she had recently recovered from the Austrian government. The petition was rejected as untimely. Regardless of the amount paid, in the event that Altmann prevailed in the Austrian civil action, she would be entitled to recover all of the court fees and her attorney's fees as part of the final judgment.

Because of what they viewed as the prohibitive cost of the lawsuit, Altmann and her family abandoned their Austrian complaint. On August 22, 2000, Altmann filed the present action against the Republic of Austria and the Gallery in the Central District of California. The Republic of Austria and the Gallery moved for dismissal under (i) Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction; (ii) Fed.R.Civ.P. 12(b)(3) for lack of venue; (iii) Fed.R.Civ.P. 12(b)(7) for failure to join indispensable parties; and (iv) the doctrine of *forum non conveniens*. The district court denied this motion on May 4, 2001.

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2. The exchange rate used is from the Declaration of Walter Friedrich in Support of the Republic's Motion to Dismiss and equals 14.7 Austrian schillings per U.S. dollar.

II. Subject Matter Jurisdiction—
The Foreign Sovereign Immunities Act

On an appeal from the denial of a motion to dismiss, we review the dismissal de novo, accepting all well-pleaded factual allegations in the complaint as true and making all reasonable inferences in the non-movant's favor. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

A foreign state is normally immune from the jurisdiction of federal and state courts in the United States. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). The United States Supreme Court has long recognized that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Id.* The FSIA provides a limited means to obtain jurisdiction over foreign sovereigns and their agencies and instrumentalities and codifies a statutory set of exceptions to foreign sovereign immunity. Those exceptions include actions involving waiver of immunity, commercial activity, rights in property taken in violation of international law, rights in property in the United States, tortious acts occurring in the United States, and actions brought to enforce arbitration agreements with a foreign state. 28 U.S.C. § 1605. Thus a federal court cannot hear claims against sovereign nations, unless the claim falls within one of these enumerated exceptions. *Verlinden*, 461 U.S. at 497, 103 S.Ct. 1962.

Altmann contends that the taking of her family's Klimt paintings by the Austrian government violates international law and falls squarely within the expropriation exception to the FSIA. The district court agreed, finding that (i) the FSIA was retroactive

to the pre- and post-war acts of the Nazis and the Austrian government; (ii) personal jurisdiction existed over the Republic and the Gallery; (iii) the doctrine of *forum non conveniens* did not require transfer of jurisdiction to Austria; (iv) all necessary parties had been joined; and (v) venue was appropriate in the Central District of California. *Altmann v. Republic of Austria*, 142 F.Supp.2d 1187 (C.D. Cal. 2001). We turn first to whether the FSIA applies to Altmann's claims.

A. The Applicability of the FSIA

We must first determine whether the district court properly held that the FSIA may be applied to the alleged wrongful appropriation by the Republic. The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The defendants maintain that jurisdiction is lacking because the FSIA may not be retrospectively applied to conduct pre-dating the Department of State's 1952 issuance of the Tate Letter, while the last taking in this case purportedly occurred in 1948. *See* Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman, May 19, 1952 ("1952 Tate Letter"), *reprinted in* 26 Dep't State Bull. 984 (1952) *and in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 app. 2, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). To the extent courts have considered the retroactivity of the FSIA, the consensus appears to be that it would encompass events dating back at least as far as the date of this letter. *See Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988); *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986); *Slade v. United States of Mexico*, 617 F.Supp. 351 (D.D.C. 1985).

We need not reach the broad conclusion of the district court that the FSIA may be generally applied to events predating the 1952 Tate Letter. Instead, we find persuasive the reasoning set forth by Judge Wald, who resigned in 1999 from the Court of Appeals for the District of Columbia Circuit to serve two years as a judge on the International Criminal Tribunal for the Former Yugoslavia. In her dissenting opinion in *Princz v. Federal Republic of Germany*, Judge Wald agreed with the majority that application of the FSIA to pre-1952 conduct is not impermissibly retroactive, but set forth a narrower rationale for that conclusion. *See* 26 F.3d 1166, 1178-79 (D.C. Cir. 1994) (Wald, J., dissenting on other grounds), *cert. denied*, 513 U.S. 1121, 115 S.Ct. 923, 130 L.Ed.2d 803 (1995).

The "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *INS v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring)). Although Congress is empowered to enact statutes with retrospective effect, a statute may not be applied retroactively "absent a clear indication from Congress that it intended such a result." *Id.* (noting that cases where the Supreme Court has found truly retroactive effect involved statutory language so clear that it could sustain only one interpretation).

A statute does not operate "retrospectively," and thus impermissibly, simply because it applies to conduct antedating the statute's enactment. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). We "must ask whether the new provision attaches new legal consequences

to events completed before its enactment." *Id.* at 269-70, 114 S.Ct. 1483. "[T]he judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *St. Cyr*, 533 U.S. at 321, 121 S.Ct. 2271 (internal quotation marks omitted). We must consider "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483. "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Id.* at 269, 114 S.Ct. 1483 (quoting *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)). On the other hand, statutes that confer or oust jurisdiction, or change procedural rules, may be applied in suits arising before their enactment without raising concerns about retroactivity. *Id.* at 274-75, 114 S.Ct. 1483. Because these rules "take[ ] away no substantive right but simply change[ ] the tribunal that is to hear the case," present law governs in such situations. *Id.* at 274, 114 S.Ct. 1483 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508, 36 S.Ct. 202, 60 L.Ed. 409 (1916)).

The *Princz* majority found that Congress's intention for the FSIA to be retroactively applied was manifest in the statute's statement of purpose that "claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." *Princz*, 26 F.3d at 1170 (quoting 28 U.S.C. § 1602). The majority interpreted Congress's use of the word "henceforth" to mean that "the FSIA is to be applied to all cases decided after

its enactment, i.e., regardless of when the plaintiff's cause of action accrued." *Id.* The court also pointed out that Congress's deletion of the language in 28 U.S.C. § 1332 providing for diversity jurisdiction over suits by a United States citizen against a foreign government would prevent prospective plaintiffs from suing over pre-enactment acts unless the FSIA's replacement section, 28 U.S.C. § 1330, were available. *Id.* at 1170. Further, the *Princz* majority suggested, as the district court found here, that application of the FSIA to the facts at issue effected merely a change of jurisdiction; thus, because the FSIA did not alter liability under the applicable substantive law, its application would not be impermissibly retroactive. *Id.* at 1170-71; *see also Altmann*, 142 F.Supp.2d at 1200.

Other courts have determined not to apply the FSIA to events predating its enactment. *See Carl Marks*, 841 F.2d 26; *Jackson*, 794 F.2d 1490; *Slade*, 617 F.Supp. 351. Nevertheless, in reaching this conclusion, these courts did not rely solely on the lack of a clear expression of congressional intent; otherwise, they would have concluded that the FSIA could not be applied to events predating its 1976 enactment. Instead, they recognized that the FSIA would properly apply to events occurring after the issuance of the 1952 Tate Letter. *See Carl Marks*, 841 F.2d at 27 ("We believe, as did the district court, that only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions." (alterations and quotation marks omitted)); *Jackson*, 794 F.2d at 1497-98 ("We agree that to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)."); *Slade*, 617 F.Supp. at 356 ("[T]he Court finds that the FSIA cannot be

applied retroactively to this case where all the operative events occurred before 1952."). Although the issuance of the 1952 Tate Letter has been recognized as the moment when "the American position changed and the 'restrictive theory of sovereign immunity' was adopted," for purposes of determining whether Austria could have settled expectations of immunity in a United States court, we note the observation of Judge Re, Chief Judge Emeritus of the Court of International Trade, that it was announced in 1948 that the State Department was reconsidering the policy. Edward D. Re, *Human Rights, Domestic Courts, and Effective Remedies*, 67 St. John's L.Rev. 581, 583-84 (1993).

Assuming, without deciding, that these cases are correct that congressional intent to allow application of the FSIA to pre-enactment facts is not manifest in the statutory language, we turn to the second prong of the *Landgraf* test and examine "whether applying the FSIA would 'impair rights a party possessed when he acted,' " *Princz*, 26 F.3d at 1178 (Wald, J., dissenting on other grounds) (quoting *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483), i.e., whether Austria would have been entitled to immunity for its alleged complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life.

In determining what rights Austria possessed when it acted, and what were its legitimate expectations, we look to the practice of American courts at that time, which was one of judicial deference "to the case-by-case foreign policy determinations of the executive branch." *Id.* at 1178-79 (citing *Verlinden*, 461 U.S. at 486, 103 S.Ct. 1962). We note that in *Verlinden*, the Supreme Court explained that "[u]ntil 1952, the State Department ordinarily requested immunity in all actions against *friendly* foreign

sovereigns." 461 U.S. at 486, 103 S.Ct. 1962 (emphasis added). [This explanation made no distinction between *in rem* and *in personam* actions.] In 1943, the Supreme Court pronounced that "it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court." *Ex Parte Peru*, 318 U.S. 578, 587, 63 S.Ct. 793, 87 L.Ed. 1014 (1943). Two years later, the Court exercised *in rem* jurisdiction over a Mexican vessel, noting the absence of a certification of immunity by the State Department or other evidence supporting immunity in conformance with the principles accepted by the State Department. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-35, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

Determining whether the FSIA may properly be applied thus turns on the question whether Austria could legitimately expect to receive immunity from the executive branch of the United States for its [alleged] complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings. Mindful that such seizures explicitly violated both Austria's and Germany's obligations under the Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, 1907 U.S.T. LEXIS 29 (entered into force Jan. 26, 1910),[3] and that Austria's Second Republic officially repudiated all Nazi transactions in 1946, we hold that Austria could not expect such immunity.

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3. A number of the treaty's accompanying regulations are directly on point. Article 46 forbids the confiscation of private property, Article 47 forbids pillage, and Article 56 specifically forbids "[a]ll seizure of . . . works of art." 1907 U.S.T. LEXIS 29, at *37, *40.

That Austria and the United States were no longer on opposite sides of World War II at the time the Federal Monument Agency [allegedly] attempted to extort valid title to the Klimt paintings does not mean that Austria could reasonably expect the granting of immunity for an act so closely associated with the atrocities of the War. Although the deprivation of private property, while discriminatory and indeed dehumanizing, pales in comparison with the horrors inflicted upon those who, unlike Ferdinand, were unable to escape the slavery, torture, and mass murder of the Nazi concentration camps, we are certain that the Austrians could not have had any expectation, much less a settled expectation, that the State Department would have recommended immunity as a matter of "grace and comity" for the wrongful appropriation of Jewish property.

Indeed, the State Department's position on that question is evident in an April 13, 1949 letter from Mr. Tate announcing the State Department's adoption of a policy to remove obstacles to recovery specifically for victims of Nazi expropriations. On April 27, 1949, the United States State Department issued a press release stating, in pertinent part:

> As a matter of general interest, the Department publishes herewith a copy of a letter of April 13, 1949 from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 in the United States District Court for the Southern District of New York.
>
> The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the

> countries or peoples subject to their controls; states that *it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property;* and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is *to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.*

Press *Release No. 296*, "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," *reprinted in Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam) (emphasis added). The press release was accompanied by a copy of the actual letter, which states in pertinent part:

> 1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls.
>
> * * *
>
> 3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Appendix A

Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 (S.D.N.Y.), *reprinted in Bernstein*, 210 F.2d at 376. [This letter strongly indicates that the State Department would not have recommended immunity as a matter of grace and comity for Austria's expropriation of the Klimt paintings. Indeed, in January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, warning that

> they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.
>
> Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons . . . resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntary effected.

Dep't St. Bull., Jan. 1943, at 21-22.] We conclude, as did Judge Wald, that the application of the FSIA infringes on no right held

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at the time the acts at issue occurred, and thus the FSIA is not impermissibly applied to Austria in this case.

This result is particularly apt for at least three additional reasons. First, we note that by the 1920s, Austria itself had adopted the restrictive theory, which recognizes sovereign immunity "with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." 1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 711, 96 S.Ct. 1854; *see also* Joseph M. Sweeney, The International Law of Sovereign Immunity 30 (U.S. Dep't of State Policy Research Study, 1963) ("At the end of World War I, the courts of Austria abandoned the absolute concept [of sovereign immunity] and adopted the restrictive concept."). As the Tate Letter of May 19 describes:

> The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 713, 96 S.Ct. 1854. Thus Austria could have had no reasonable expectation of immunity in a foreign court. As Judge Wald notes, the 1945-46 Nuremberg trials signaled "that the international community, and particularly the United States . . . would not have supported a broad enough immunity to shroud the atrocities

committed during the Holocaust." *Princz*, 26 F.3d at 1179 (Wald, J., dissenting on other grounds). Because a United States court would apply the international law of takings, which presumably would be applied in any foreign court, the application of the FSIA to the facts of this case "merely address[es] *which* court shall have jurisdiction" and thus "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (emphasis in original) (citing *Landgraf*, 511 U.S. at 275, 114 S.Ct. 1483). Because such application would "affect only *where* a suit may be brought, not *whether* it may be brought at all," *id.* (emphasis in original), the application of the FSIA to the facts of this case is not impermissibly retroactive.

Second, the cases holding the FSIA inapplicable to pre-1952 events involve economic transactions entered into long before the facts of this case arose and, unlike here, prior to the defendant country's acceptance of the restrictive principle of sovereign immunity and to the widespread acceptance of the restrictive theory. The Soviet Union, which was sued in *Carl Marks* over its default with respect to debt instruments issued in 1916, *see* 841 F.2d at 26, was in 1952, together with the Soviet satellite countries and the United Kingdom, one of the few remaining jurisdictions that supported "continued full acceptance of the absolute theory of sovereign immunity." 1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 715, 96 S.Ct. 1854. The 1952 Tate Letter also noted that China, sued in *Jackson* over its default on bonds issued in 1911, *see* 794 F.2d at 1491, was among the jurisdictions not yet having clearly adopted the restrictive principle. 1952 Tate Letter,

reprinted in Alfred Dunhill, 425 U.S. at 712, 96 S.Ct. 1854. As for Mexico, sued in *Slade* over its default over a 1922 interest agreement, *see* 617 F.Supp. 351, it is well-known that Latin-American nations did not accept the restrictive approach to immunity well into the 1980s. *See* Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, J. Chinese L., Spring 1987, at 22, 27.

Third, the disputes in *Carl Marks*, *Jackson*, and *Slade* essentially involved contracts, an area in which courts have traditionally deferred to the "settled expectations" of the parties at the time of contracting in recognition of the parties' allocation of risk. Such deference is especially due in financial transactions involving foreign debt instruments, where unexpected judicial intrusion essentially would re-write the parties' original bargain. Such presumptions are inapplicable in the context of a claim like the international takings violation at issue here. Thus, even if Austria had indeed expected not to be sued in a foreign court at the time it acted, an expectation which we have explained would be patently unreasonable, such expectation would be due no deference.

For these reasons, we hold that application of the FSIA to the pre-1952 actions of the Republic of Austria is not impermissibly retroactive.

B. Expropriation Exception to Sovereign Immunity

The FSIA's expropriation exception to immunity provides that:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. . . .

28 U.S.C. § 1605(a). This exception to foreign sovereign immunity "is based upon the general presumption that states abide by international law and, hence, violations of international law are not 'sovereign' acts." *West*, 807 F.2d at 826; H.R.Rep. No. 94-1487, at 14, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613 ("[T]he central premise of the bill [is that] decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law."); *see also Trajano v. Marcos (In re Estate of Marcos Human Rights Litig.)*, 978 F.2d 493, 497-98 (9th Cir. 1992) ("Congress intended the FSIA to be consistent with international law. . . ."). For guidance regarding the norms against takings in violation of international law, we may look to court decisions, United States law, the work of jurists, and the usage of nations. *See Siderman de Blake*, 965 F.2d at 714-15; *West*, 807 F.2d at 831 n. 10. Nevertheless, we recognize that "[a]t the jurisdictional stage, we need not

decide whether the taking actually violated international law; as long as a 'claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction.' " *Siderman de Blake*, 965 F.2d at 711 (quoting *West*, 807 F.2d at 826).

The facts alleged by Altmann fall squarely within the expropriation exception to sovereign immunity. There is no question but that "rights in property" are in issue. The Austrian Republic and Gallery insist on Adele's will as the basis for their legal ownership of the Klimt paintings. Altmann, as a true heir and as a representative of other heirs, asserts the will has no such legal effect and the documents unearthed in 1998 revealed that fact to the current Austrian government and to the Austrian Gallery, which nevertheless have retained possession of the paintings without payment therefor.

The next question is whether the property in issue was taken in violation of international law. To constitute a valid taking under international law three predicates must exist. First, "[v]alid expropriations must always serve a public purpose." *West*, 807 F.2d at 831. Second, "aliens [must] not be discriminated against or singled out for regulation by the state." *Id.* at 832. Finally, "[a]n otherwise valid taking is illegal without the payment of just compensation." *Id.* (relying on reports from the Foreign Claims Settlement Commission, international law journals, the *Restatement (Second) of Foreign Relations Law of the United States*, and federal case law). To fall into this exception, the plaintiff cannot be a citizen of the defendant country at the time of the expropriation, because " '[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.' " *Siderman de Blake*, 965 F.2d at 711 (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990)).

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The facts of record, which in this procedural posture we must take as true, show that the Klimt paintings have been wrongfully and discriminatorily appropriated in violation of international law. The Nazis did not even pretend to take the Klimt paintings for a public purpose; instead, Dr. Fuehrer sold them for personal gain or exchanged them to supplement his private collection. In addition, their taking appears discriminatory. Altmann is a Jewish refugee, now a United States citizen, who is a descendant of a Czech family whose property was looted by the Nazis because of their religious heritage. According to Altmann, despite convening a Committee to evaluate expropriation claims and return stolen artwork, the Austrian government intentionally intervened to thwart a fair and impartial vote on the restitution of the Klimt paintings. Further, the Austrian government has not yet returned the paintings to Altmann and her family or justly compensated them for the value of the paintings.[4] Without compensation, this taking cannot be valid. *See West*, 807 F.2d at 832.

Finally, the Austrian Gallery is engaged in commercial activity in the United States. Altmann has satisfied the FSIA's statutory nexus requirement by showing that the paintings are owned or operated by an agency or instrumentality of the foreign state, here the Austrian Gallery, which is "engaged in commercial activity in the United States." 28 U.S.C. § 1605(a)(3). The defendants

4. Austria now claims the Altmann family itself later donated the paintings in exchange for export permits on other artwork returned to the family after World War II. Altmann argues this practice was illegal, as the Austrian government later found, and thus any purported "donation" was legally void. Because this dispute is a mixed factual and legal question, it cannot be resolved on appeal and is best left for the trial court.

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do not contest that the Gallery is an "agency or instrumentality." The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* at § 1603(d).

Altmann argues that the Gallery engages in commercial activity in the United States by authoring, editing, and publishing in the United States both a book entitled *Klimt's Women*, as well as an English-language guidebook, containing photographs of the looted paintings.[5] She also contends that the advertisements in the United States of Gallery exhibitions, particularly those relating to the Klimt paintings, as well as operation of the Gallery itself, constitute commercial activity. The key commercial behavior of the Gallery here is not its operation of the museum exhibition in Austria, however, but its publication and marketing of that exhibition and the books in the United States. *Klimt's Women*, for example, is published in English in the United States by Yale University Press and capitalizes on the images of three of the paintings at issue. That book was published in conjunction with a large exhibition at the Gallery featuring the expropriated paintings. Furthermore, the Austrian Gallery asserts copyright ownership as "authors"; two employees of the Gallery edited

5. *See* Appendix A, cover page of the Austrian Gallery English language guidebook; Appendix B, excerpts from *Gustav Klimt in the Austrian Gallery Belvedere*, authored by Gerbert Frodl, the director of the Austrian Gallery; Appendix C, excerpts from *Klimt's Women*, edited by Tobias Natter, the curator of twentieth century art at the Austrian Gallery, and Gerbert Frodl; and Appendix D, cover page of *Austrian Information*, July/August 2000, published by the Austrian Press and Information Service.

the book; and the director of the Gallery is listed as responsible for its content. The museum guidebook is also published in English and features the painting *Adele Bloch-Bauer I* on its cover. The publication and sale of these materials and the marketing of the Klimt exhibition in the United States are commercial activities in and of themselves, but are also a means to attract American tourists to the Gallery. Given that the commercial activity is centered around the very paintings at issue in this action and far exceeds that which we found sufficient to justify applying § 1605(a)(3) in *Siderman de Blake*, 965 F.2d at 709, we must conclude that the Gallery is engaging in commercial activity sufficient to justify jurisdiction under the FSIA.

III. Due Process and Personal Jurisdiction

Austria maintains that even if an exception to sovereign immunity applies, Altmann's suit cannot be maintained unless the district court has personal jurisdiction over the Republic and the Gallery. Under the FSIA, however, personal jurisdiction over a foreign state exists where subject-matter jurisdiction exists and where proper service has been made. 28 U.S.C. § 1330(b). Because we hold that the paintings are subject to the expropriation exception of the FSIA, and there has been proper service of process under § 1608, as the Republic concedes, the court has personal jurisdiction over the Republic and the Gallery.

We also hold that, if the facts are as Altmann alleges, the assertion of personal jurisdiction over the Republic and the Gallery complies with the Due Process Clause of the Fifth Amendment. Assuming that a foreign state is a "person" for purposes of the Due Process Clause, *Republic of Argentina v. Weltover*, 504 U.S. 607, 619, 112 S.Ct. 2160, 119 L.Ed.2d

394 (1992), there must be sufficient "minimum contacts" between the foreign state and the forum "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice," *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (citation omitted). *See also Theo. H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969, 974 & n. 3 (9th Cir. 1999) ("[W]e need not decide whether [the government agency] is a 'person' for purposes of the Due Process Clause. We simply assume, without deciding, that both are."). "Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). "Where service is made under FSIA section 1608, the relevant area in delineating contacts is in the entire United States, not merely the forum state." *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1447 (9th Cir. 1991) (internal quotation marks and alterations omitted).

The Republic and the Gallery have sufficient minimum contacts with the United States such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. As previously noted, the Gallery edits and publishes several publications in the United States, two of which capitalize on the very paintings at issue here. The Gallery's publication and marketing of these books is designed to solicit tourism by United States citizens in Austria and to attract those visitors to the Gallery, in particular to view the Klimt works. Both the Republic and the Gallery profit from the sales of the books and the resulting United States tourism.

Furthermore, it is not only the Gallery's activities in the forum, but also actions taken by the Government on behalf of the Gallery that support personal jurisdiction. *See Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981). The Austrian Press and Information Service of the Austrian Embassy has published a tourism brochure advertising the Klimt exhibition at the Austrian Gallery and featuring the portrait of Adele Bloch-Bauer on its cover. This brochure is available at Austrian consulates throughout the United States, distributed to a large mailing list of individuals in the United States, and is widely available on the Internet. The advertisement and promotion of this exhibition directly benefit the Gallery.

The Republic itself does not contest that it has substantial, systematic, and continuous contacts with the United States through its operation of consulates, sponsorship of tourist relations and trade, and promotion of Austrian business interests. The Republic alone operates three consulates in the United States and twenty-six honorary consulates in the United States and its territories.[6] The Austrian Trade Commission and Austrian National Tourist Offices operate in both New York and Los Angeles. Austria also recently invested $400,000 in the renovation of the Rudolf Schindler house, a historic architectural landmark in Los Angeles. Thus Altmann has established "continuous and systematic contacts." *Helicopteros*, 466 U.S. at 414-16 & nn. 8-9, 104

6. *See* Austrian Press and Information Service, *Austrian Offices in the United States, at* <http: //www.austria.org/govoff.htm# congen>. In addition to the Consulates General in New York City, Los Angeles, and Chicago, honorary consulates exist in Anchorage, Atlanta, Boston, Buffalo, Charlotte, Columbus, Denver, Detroit, Honolulu, Houston, Kansas City, Miami, Milwaukee, Nassau, New Orleans, Philadelphia, Pittsburgh, Portland, Richmond, St. Louis, St. Paul, St. Thomas, San Francisco, San Juan, Seattle, and Warwick.

S.Ct. 1868; *Siderman de Blake*, 965 F.2d at 709-10 (finding jurisdiction where hotel solicited United States tourism and accepted United States credit cards for payment for guest reservations). We do not hold that these contacts are enough to support general jurisdiction, but they support the reasonableness of the assertion of specific jurisdiction based on the Gallery's publication of books and advertisements featuring the Klimt works. We conclude that fair play and substantial justice would not be offended if we maintain jurisdiction over Austria in this case.

IV. Joinder of Parties

We reject Austria's contention that Altmann's co-heirs are necessary parties to the litigation requiring dismissal of this action under *Rule 19* unless they are joined. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir.), *cert. denied*, __ U.S. __, 123 S.Ct. 98, 154 L.Ed.2d 27 (2002). In determining whether the co-heirs are necessary parties under Rule 19, we consider whether, in the absence of their joinder, complete relief can be accorded to Altmann. *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). In the alternative, we consider whether the co-heirs can claim a legally protected interest in the subject of the suit such that a decision in their absence will (1) impair or impede their ability to protect that interest; or (2) expose the Republic of Austria and Altmann to the risk of multiple or inconsistent obligations by reason of that interest. *See* Fed.R.Civ.P. 19(a)(2); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999). Joinder is "contingent . . . upon an initial requirement that the absent party *claim* a legally protected interest relating to the subject matter of the action." *Northrop Corp. v. McDonnell*

Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983) (emphasis added). Where a party is aware of an action and chooses not to claim an interest, the district court does not err by holding that joinder was "unnecessary." *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999).

Although Altmann is an heir to only twenty-five percent of her uncle's estate, her relatives have assigned to her an additional fifty percent of their interest in the estate for purposes of this suit. Another relative, Altmann's cousin, who holds the remaining twenty-five percent interest in the estate does not live in the United States and is aware of the litigation. Given that all necessary parties are aware of the litigation and have chosen not to claim an interest, joinder of these parties is unnecessary to this suit. *See id.* (holding that the district court did not err by finding that a party who was aware of an action but chose not to claim an interest was not a necessary party under Rule 19).

V. Venue

The Republic and the Gallery also appeal the district court's denial of their motion to dismiss for improper venue. Relying on 28 U.S.C. § 1391(f)(3), the district court found that venue was appropriate in the Central District of California because it is a "judicial district in which the agency or instrumentality is licensed to do business or is doing business." The district court found "no authority that suggests that a foreign agency or instrumentality that engages in 'commercial activity' within a district is not also 'doing business' within a district." *Altmann*, 142 F.Supp.2d at 1215.

We agree with the district court that venue is appropriate in the Central District. Section 1391(f)(3) authorizes venue in any judicial district in which an agency or instrumentality of a foreign state is "doing business" if the agency or instrumentality is sued, and § 1391(f)(4) authorizes venue in the federal district court for the District of Columbia if the foreign state itself is sued. We do not read the statute to require that (f)(3) be the exclusive basis on which venue is available when an agency or instrumentality of the foreign state is sued, or that (f)(4) be the exclusive basis when a foreign state is sued. Sections (f)(3) and (f)(4) are alternative venue provisions, separated by the word "or." Where, as here, both the foreign state and its instrumentality are sued in the same suit, both venue provisions are potentially available. Because the publications and advertisements of the Austrian Gallery that form the basis for jurisdiction under the FSIA have been distributed in the Central District of California, we hold that the Austrian Gallery, an agency or instrumentality of Austria, is "doing business" in the district and that venue is therefore proper in the Central District under § 1391(f)(3). (We also note that an Austrian Consulate is located on Wilshire Boulevard in Los Angeles, a short distance from the federal courthouse; that diplomatic representatives of Austria work in the Central District; and that Altmann, now 86 years old, would be forced to travel to Washington, D.C. to pursue this action, significantly outweighing any inconvenience potentially experienced by the Republic of Austria.)

VI. Forum Non Conveniens

Finally, we hold that the district court did not err in denying Austria's motion to dismiss the action based on the doctrine of *forum non conveniens*. A district court may decline to exercise

its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). Because this determination is committed to the sound discretion of the district court, Austria faces an uphill battle in persuading us that the district court abused its discretion by denying Austria's motion. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1409 (9th Cir. 1983); *see also Leetsch v. Freedman*, 260 F.3d 1100, 1102-03 (9th Cir. 2001) (Where the court has considered the availability of an adequate alternative forum, and where it has considered and reasonably balanced all relevant public and private interest factors, its decision deserves substantial deference.).

Altmann contends that Austria cannot meet its threshold burden of providing an adequate alternative forum. The district court agreed, finding that because the Austrian filing fees are so oppressively burdensome and Altmann's claims will likely be barred by the thirty-year statute of limitations under Austrian law, these factors render the Austrian courts unavailable.

We disagree that the cost of the lawsuit in Austria, alone, makes this forum unavailable. The mere existence of filing fees, which are required in many civil law countries, does not render a forum inadequate as a matter of law. *See, e.g., Nai-Chao v. Boeing Co.*, 555 F.Supp. 9, 16 (N.D. Cal. 1982) (holding that despite filing fees amounting to one percent of claim and an additional one-half percent for each appeal, Taiwan was an adequate forum), *aff'd sub nom, Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983); *see also Mercier v. Sheraton*

Int'l, Inc., 981 F.2d 1345, 1353 (1st Cir. 1992), *cert. denied*, 508 U.S. 912, 113 S.Ct. 2346, 124 L.Ed.2d 255 (1993) (fifteen percent Turkish bond would not prohibit court from finding Turkey adequate forum); *Murray v. BBC*, 81 F.3d 287, 292-93 (2d Cir. 1996) (England was an adequate forum despite the plaintiff's claim that the American contingency fee system was the only way he could afford a lawyer). Altmann and her co-plaintiffs received significant legal aid based on her petition to the court for a reduction of fees. She did not appeal to further reduce these fees; nor did she apply for an extension of the term of payment of the court fees. Finally, it appears that the fee application was made without calculating the present value of Altmann's home or taking into account the value of a number of porcelain pieces returned by the Austrian government. Arguably, Altmann has greater assets available to her than she listed in her application to the court. Thus the Austrian filing fees are not a basis for finding an inadequate forum.

Nor are we convinced that Austria's statute of limitations bars Altmann's action in that forum. Although Altmann is correct that a thirty-year statute of limitations generally applies to civil claims in Austria, under Austrian law, acts of fraudulent concealment toll the statute. Moreover, the statute of limitations does not prevent Altmann from basing her claims on the 1998 Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections. This legislation "authorizes the Minister of Finance to return artworks in special instances enumerated in the States where claims could otherwise not be made," including the expiration of a statute of limitations.

Nevertheless, our conclusions with respect to the filing fees and the statute of limitations do not compel us to dismiss the

complaint on the grounds of *forum non conveniens*. Altmann's choice of forum should not be disturbed unless, when weighing the convenience of the parties and the interests of justice, "the balance is strongly in favor of the defendant." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). To make this determination, we consider both the "private interest" factors affecting the convenience of the litigants, including all "practical problems that make trial of a case easy, expeditious and inexpensive" as well as the "public interest" factors affecting the convenience of the forum, which include the administrative difficulties flowing from court congestion; the local interest in having localized controversies resolved at home; the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-09, 67 S.Ct. 839.

Austria claims that the private and public interest factors weigh in favor of conducting a trial in Austria. It argues that the evidentiary sources, the witnesses, and the paintings are all located in Austria and a United States district court would be required to apply Austrian law. We do not agree that these factors outweigh Altmann's choice of forum. Maria Altmann is an elderly United States citizen, who has resided in this country for over sixty years. The requisite foreign travel, coupled with the significant costs of litigating this case in Austria, weigh heavily in favor of retaining jurisdiction in the United States. Because of the discrete issues presented, this case alone is unlikely to cause much congestion in the courts. Finally, Austria has not set forth any potential conflicts of law beyond the statute of limitations, which it concedes is tolled for fraudulent concealment, as in the

United States. Because the Republic of Austria has not made a "clear showing of facts which either (1) establish such oppression and vexation of a defendant as to be out of proportion to the plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems," *Cheng*, 708 F.2d at 1410 (internal quotation marks omitted), we uphold the findings of the district court as to *forum non conveniens*.

VII. Conclusion

Maria Altmann has alleged sufficient facts which, if proven, would demonstrate that the Klimt paintings were taken in violation of international law. At least as to the Republic of Austria and the national Austrian Gallery, applying the FSIA to the takings of these paintings in the 1930s and 1940s is not an impermissible retroactive application of the Act. Because the remainder of the Act's and other jurisdictional prerequisites are met, the district court properly exercised jurisdiction over Altmann's claims.

AFFIRMED and REMANDED for further proceedings.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED MAY 4, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 00-8913 FMC (AIJx)

MARIA V. ALTMANN,

Plaintiff,

vs.

REPUBLIC OF AUSTRIA, et al.

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS; ORDER GRANTING LEAVE TO AMEND COMPLAINT

Plaintiff is the niece and heir of Adele Bloch-Bauer who was a model for, and whose husband was the owner of, works of art painted by Gustav Klimt. Plaintiff brings this action to recover six Klimt paintings which were stolen by the Nazis and are presently in the possession of Defendants. By this Order, the Court concludes that it has jurisdiction over defendants by virtue of an immunity exception contained in the Foreign Sovereign Immunities Act.

Appendix B

This matter is before the Court on the Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, under Rule 12(b)(6) for failure to state a claim upon which relief may be granted,[1] under 12(b)(3) for lack of venue, under Rule 12(b)(7) for failure to join indispensable parties, and under the doctrine of *forum non conveniens*. For the reasons stated herein, the Defendants' Motion is **DENIED.**

I. Background

A. Factual Allegations of Complaint

1. The Nature of the Dispute

The present dispute centers on ownership rights to six paintings by the world-renowned artist, Gustav Klimt. Specifically, at issue in the current action are six paintings with the following titles: *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Beechwood*, *Apple Tree I*, *Houses in Unterach am Attersee*, and *Amalie Zuckerkandl* (collectively, "the paintings").[2] The paintings are currently in the possession of

1. Defendants' Rule 12(b)(6) motion was based on the act of state doctrine. Defendants have since withdrawn this motion.

2. The paintings at issue are valued at approximately $150 million. It appears that these paintings are significant works of art in the Gallery's collection. All the paintings, with the exception of *Amalie Zuckerkandl*, have been displayed in the Gallery within the last two years. *Adele Bloch-Bauer I* appears on the cover of the Gallery's guidebook, and *Adele Bloch-Bauer I*, *Adele Bloch-*

(Cont'd)

the Republic of Austria ("the Republic") and/or the Austrian Gallery ("the Gallery").[3] Plaintiff seeks recovery of these paintings that were owned by her family before they were stolen by the Nazis in the early 1940s in Austria.[4]

2. Events in Pre-World War II Austria

The paintings at issue were owned by Ferdinand Bloch-Bauer, Plaintiff's uncle. Plaintiff's aunt, Ferdinand's wife, Adele Bloch-Bauer, died in 1925. When Adele died, she left a will asking that her husband consider donating six paintings

(Cont'd)

Bauer II, and *Amalie Zuckerkandl* appear in a book entitled *Klimt's Women* that is edited by Gallery employees and distributed in the United States by Yale University Press. These three paintings were also featured in an exposition entitled "*Gustav Klimt: Portraits of European Women*" that was held from September 20, 2000, to January 7, 2001, in Vienna.

3. Collectively, the Republic and the Gallery are referred to as "Defendants" or "Austria".

4. Plaintiff is Jewish. She and her family suffered persecution under the Nazi regime in Austria and ultimately fled the country.

Prior to 1938, Austria was an independent democratic republic. In 1938, the Nazis invaded Austria ("the Anschluss") and claimed Austria as a part of Germany. Almost immediately after the invasion, the Nazis enacted anti-Jewish laws and regulations that severely restricted the property rights of those of Jewish descent. Businesses and property belonging to Jews was "aryanized," i.e., given to non-Jewish individuals whose loyalty belonged to the Nazi party.

to the Austrian Gallery on his death.[5] When the will was probated, the paintings were found to be part of Ferdinand's property, not Adele's. Ferdinand stated in 1926 that he intended to donate the paintings in accordance with his wife's wishes, but did not ever do so. Ferdinand donated one painting to the Gallery in 1936, a painting by Gustav Klimt entitled *Schloss Kammer am Attersee III.*

3. Plaintiff's Escape to the United States

Plaintiff was married shortly before the Nazi's annexation of Austria in 1938. Plaintiff and her husband escaped Austria to the Netherlands, to Britain, and finally to the United States. In 1942, Plaintiff arrived in Los Angeles, where she has lived since that time. Plaintiff became a naturalized citizen in 1945.

4. Ferdinand and His Artwork — The Nazi Occupation of Austria

Ferdinand left Austria in 1938; the Nazis took his home, his business, and his artwork. Four hundred pieces of porcelain were sold at public auction. Several Nineteenth century Austrian paintings went to Adolph Hitler's and

5. The six paintings addressed in Adele's will are *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Beechwood*, *Apple Tree I*, *Houses in Unterach am Attersee*, and *Schloss Kammer am Attersee III.* The portrait of Amalie Zuckerkandl, which is also at issue in this action, was not among those mentioned in Adele's will. Conversely, *Schloss Kammer am Attersee III*, which was mentioned in Adele's will, is not at issue in this action because Ferdinand donated it to the Gallery in 1936.

Herman Göring's private collections. Dr. Erich Führer, a Nazi lawyer in charge of liquidating Ferdinand's collection, also benefitted.

The paintings at issue in the present suit were transferred in various ways:

Adele Bloch-Bauer I and *Apple Tree I* were traded in 1941 to the Austrian Gallery for *Schloss Kammer am Attersee III.*[6] *Adele Bloch-Bauer I* appears on the cover of the Gallery's official guidebook of the museum.

Beechwood was sold in November 1942 to the Museum of the City of Vienna. In 1947, the Museum offered to return the painting to Plaintiff and Ferdinand's other heirs (collectively, "the heirs") in exchange for refund of the purchase price. The painting was, in the late 1940s, transferred to the Gallery with the assistance of the heirs' lawyer.

Adele Bloch-Bauer II was sold in March 1943 to the Austrian Gallery.

Houses in Unterach am Attersee was kept by Dr. Führer for his personal collection. This painting was later retrieved from that collection by Plaintiff's brother. It was in possession of the heirs' Austrian lawyer in late 1940s and was returned to the Gallery in exchange for export licenses for other works of art.

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6. *Schloss Kammer am Attersee III* was later sold to Gustav Klimt's son. In 1961, this painting was donated to the Gallery.

The original disposition of *Amalie Zuckerkandl*[7] is not known; the painting eventually turned up in the hands of art dealer Vita Künstler, who donated it to the Gallery in 1988.

5. After the War

Ferdinand died just a few months after the war in Europe ended, but he took preliminary steps to retrieve his stolen property. Ferdinand made no bequest in his will to the Austrian Gallery.

In 1946, the Republic enacted a law declaring that all transactions that were motivated by discriminatory Nazi ideology were to be deemed null and void; however, the Republic often required the original owners of such property, including works of art, to repay to the purchaser the purchase price before an item would be returned.

Austrian law also prohibited the export of artworks that were deemed to be important to Austria's cultural heritage. It was the policy after the war to use the export license law to force Jews who sought export of artworks to trade artworks for export permits on other works.

6. Ferdinand's Heirs' Attempts to Secure the Paintings After the War

In 1947, a Swiss court recognized Plaintiff as the heir to 25% of Ferdinand's estate. The heirs retained an Austrian

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7. Another Austrian family has asserted ownership rights to this painting as well.

lawyer to attempt to secure return of Ferdinand's property. Plaintiff's older brother was a captain in the Allied Forces, and he personally recovered *Houses in Unterach am Attersee* from Dr. Führer's private collection. The painting was kept in his or his lawyer's apartment in Vienna pending permission to export the painting.

In February 1948, the Austrian lawyer sought return of *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, and *Apple Tree I* from the Gallery. The Gallery asserted that five of the six paintings at issue were bequeathed to it by the will of Adele Bloch-Bauer in 1926, and that Ferdinand was merely granted permission to keep the paintings during his lifetime. The Gallery demanded the heirs return the remaining paintings to it.

7. The Museum's Actions In Protecting Its Collection

In March 1948, Dr. Garzarolli of the Austrian Gallery learned of the contents and probate proceedings of Adele's will. Specifically, Garzarolli learned that Adele had expressed the wish that Ferdinand donate the paintings to the Gallery, but that Adele had not herself bequeathed the paintings to the Gallery. Garzarolli acknowledged as much in a March 8, 1948, letter to his predecessor wherein Garzarolli expressed his concern at his predecessor's failure to obtain a declaration of gift in favor of the state from Ferdinand.[8] Dr. Garzarolli

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8. An excerpt of this letter is set forth in ¶ 42 of the Complaint:

> Because there is no mention of these facts [the purported donation of the Klimt paintings by Adele or Ferdinand]
>
> (Cont'd)

did not reveal to the heirs or their lawyers the files from Adele's probate proceedings that he had in his possession; rather, he prepared to sue the heirs for the remaining paintings.

8. The Exchange—Donations for Export Licenses

In late March 1948, Gallery officials reviewed the artwork in the apartment belonging to Plaintiff's brother or his lawyer to determine whether an export license could be granted. The officials recognized the pieces as part of Ferdinand's collection. Dr. Garzarolli sought the assistance of the Austrian Attorney General in obtaining possession of the remaining three paintings.

(Cont'd)

> in the available files of the Austrian Gallery, i.e., neither a court-authorized nor a notarized or other personal declaration of Ferdinand Bloch-Bauer exists, which in my opinion you certainly should have obtained, I find myself in an extremely difficult situation. . . . I cannot understand why even during the Nazi era an incontestable declaration of gift in favor of the state was never obtained from Ferdinand Bloch-Bauer. . . .
>
> In any case, the situation is growing into a sea snake . . . I am very concerned that up until now all of the cases of restitution have brought with them immense confusion. In my opinion it would be also in your interest to stick by me while this is sorted out. Perhaps that way we will best come out of this not exactly danger-free situation.

Appendix B

In early April, Dr. Garzarolli wrote to Dr. Otto Demus, president of the Federal Monument Agency (the agency in charge of the export licenses), and suggested that the processing of export permits for Ferdinand's collection be delayed "for tactical reasons." Dr. Demus met with the heirs' lawyer regarding the artwork already in Austria and other items of artwork belonging to Ferdinand to be returned to Austria by the Allied forces. The lawyer understood from Dr. Demus that "donations" to the Gallery would have to occur in order to procure export licenses for any of Ferdinand's collection.

The lawyer, on behalf of the heirs,[9] agreed to "donate" the Klimt paintings in exchange for permits on the remaining items. The lawyer learned the contents of Adele's will, but thought Ferdinand's expressed intention to donate the Klimt paintings would be binding. The lawyer executed a document purporting to acknowledge the intention to donate the paintings expressed in Adele's will. The lawyer gave the Gallery *Houses in Unterach am Attersee* on April 12, 1948.

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9. Plaintiff was unaware of the attorney's actions until 1999. She did not authorize the attorney to negotiate on her behalf, nor did she authorize "donating" the paintings to the Gallery. Until 1999, Plaintiff believed that her family had donated the paintings to the Gallery. The Gallery's misrepresentations to the attorney were relayed to her brother, who later relayed them to her.

Appendix B

9. 1998 Discovery by Austrian Journalist

In 1998, after the seizure of two paintings by Egon Schiele in New York,[10] the Austrian federal minister opened up the Gallery's archives to permit researchers to prove that no looted artworks remained in Austria. Thereafter, an Austrian journalist, Hubertus Czernin, published a series of articles exposing the fact that Austria's federal museums had profited greatly from exiled Jewish families after the war.[11]

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10. The painting *Portrait of Wally* by Egon Schiele was taken from its owner in Nazi-occupied Austria. *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000). At the end of World War II, the painting was recovered by Allied Forces and was returned to Austria to be returned to its rightful owner. *Id.* The painting was not ever returned to its owner. *Id.* In 2000, the painting, while on loan to the Museum of Modern Art in New York City, was seized pursuant to a seizure order issued by a United States magistrate judge pending proceedings under the National Stolen Property Act ("NSPA"), 18 U.S.C. § 2314, which prohibits transporting stolen goods in foreign commerce. *Id.* The court held that the painting could not be considered "stolen" under the NSPA once it was recovered by Allied Forces because the Allied Forces would be considered the owner's "agent" for purposes of the NSPA.

11. In January 1999, the Austrian government permitted Czernin to copy documents from the Gallery archives. Czernin provided copies of these documents to Plaintiff's lawyer, and Plaintiff learned how the Klimt paintings came to be in the possession of the Austrian Gallery.

California law recognizes that owners of stolen works of art are often unable immediately to file a cause of action for its recovery. *See Society of California Pioneers v. Baker*, 43 Cal. App. 4th 774, 50 Cal. Rptr. 2d 865 (1996); Cal.Code Civ. P. § 338 (establishing a three year statute of limitations that accrues upon the discovery of the whereabouts of a stolen article of artistic significance).

Adele Bloch-Bauer I, reported by the Gallery as being donated to the Gallery in 1936, was revealed to have been transferred to the museum in 1941 with a letter from Dr. Führer signed "Heil Hitler." The archives were closed, but government research essentially confirmed Czernin's stories.

10. New Law Favoring Return of Artwork Stolen by Nazis

In response, in September 1998, a new restitution law was proposed in Austria, designed to return artworks that had been donated to federal museums under duress in exchange for export permits. The law was enacted in December.

A committee of government officials and art historians was formed by the new law, and in February 1999, the committee recommended that hundreds of artworks be returned to their rightful owners. In response to inquiries from the Austrian parliament, Minister Gehrer, Austria's federal minister of education and culture, concluded that there was an evident connection between the donation of the Klimt paintings and the export permit law.

There was political opposition to the return of the Klimt paintings. The committee received an incomplete report regarding the Klimts, and some members did not receive an expert's opinion regarding the invalidity of the purported bequest to the Gallery. On June 28, 1999, the committee met and affirmed a recommendation that the Klimts not be returned. The vote on the return of the paintings was predetermined, and one member of the committee eventually

resigned in protest. The committee did vote to return 16 Klimt drawings and 19 porcelain settings previously donated by the family in exchange for export permits.

Plaintiff protested the committee's decision and requested arbitration. The Republic rejected this approach, suggesting that the heirs' only remedy was to go to court.

11. Attempt at Austrian Judicial Intervention

In September 1999, Plaintiff announced she would file a lawsuit regarding the paintings. However, the court costs associated with bringing such a suit in Austria are determined by the amount in controversy. Plaintiff would have to pay a filing fee of approximately two million Austrian Schillings[12] for the privilege of suing the Republic and the Gallery even after obtaining a partial waiver of court costs. The Austrian Court noted the amount of Plaintiff's assets and suggested that Plaintiff should spend all of her liquid assets in furtherance of her claim because the alternative would be to charge the court costs to the Austrian public.

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12. The current exchange rate of Austrian Schillings to United States Dollars is approximately 15:1. In today's terms the filing fee would be approximately $133,000. In October 1999, when Plaintiff filed her request for assistance, the Austrian Schilling was stronger against the United States dollar, so the filing fee was slightly higher. According to Plaintiff, the exchange rate in October 1999 was 10:1, and the filing fee would have been $200,000. Nevertheless, regardless of the exchange rate used, the filing fee is quite substantial.

B. Factual Allegations Regarding Jurisdiction[13]

The Gallery publishes a museum guidebook in English available for purchase by United States citizens. The Gallery has lent *Adele Bloch-Bauer I* to the United States in the past.

The Gallery is visited by thousands of United States citizens each year. The Gallery's collection, including the paintings at issue in this action, is advertised in the United States.

The Republic has a consular office in Los Angeles. The Republic promotes Austrian filmmakers in the United States. The Republic owns real property in Los Angeles.

C. Plaintiff's Claims

Plaintiff seeks recovery under a variety of causes of action. Her first cause of action is for declaratory relief pursuant to 28 U.S.C. § 2201; Plaintiff seeks a declaration that the Klimt paintings should be returned pursuant to the 1998 Austrian law. Plaintiff's second cause of action is for replevin, presumably under California law; Plaintiff seeks return of the paintings. Plaintiff's third cause of action seeks

13. Plaintiff also makes allegations regarding the activities of the National Tourist Office in United States. These allegations may not be used to assert jurisdiction over the Republic or the Gallery. *See* 28 U.S.C. § 1605(a)(3) (applying expropriation exception to FSIA when expropriated property is owned or operated by an agency or instrumentality of the foreign state when ***that*** agency or instrumentality is engaged in commercial activity in the United States).

rescission of any agreements by the Austrian lawyer with the Gallery or the Federal Monument Agency due to mistake, duress, and/or lack of authorization. Plaintiff's fourth cause of action seeks damages for expropriation and conversion, and her fifth cause of action seeks damages for violation of international law. Plaintiff's sixth cause of action seeks imposition of a constructive trust, and her seventh cause of action seeks restitution based on unjust enrichment. Finally, Plaintiff's eighth cause of action seeks disgorgement of profits under the California Unfair Business Practices law.

D. The Present Motion

Defendants argue that they are immune from suit under the doctrine of sovereign immunity, and that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1601, *et seq.*, does not strip them of this immunity. Defendants also argue that the Court should decline to exercise jurisdiction over the present dispute under the doctrine of *forum non conveniens*, that the action should be dismissed for Plaintiff's failure to join indispensable parties under Fed. R. Civ. P. 19, and that venue in the Central District of California is improper.

Plaintiff argues that Defendants are subject to the Foreign Sovereign Immunities Act, but that the expropriation exception to sovereign immunity is applicable to Defendants. Plaintiff also argues that even if Defendants are not subject to the FSIA, they are required to return the paintings under international and Austrian law. Plaintiff argues that the Court should not apply the doctrine of *forum non conveniens* because no reasonable alternative forum is available. Plaintiff

also argues that dismissal is not required under Fed. R. Civ. P. 19 because Plaintiff has received assignments of rights from other parties with interest in the paintings and because, in the absence of an alternative forum, it would be unjust to dismiss the present action. Finally, Plaintiff argues that venue is appropriate in the Central District because Defendants have failed to deliver the paintings to her within the district and because Defendants do business within the district.

II. Subject Matter Jurisdiction — The Applicability of the Foreign Sovereign Immunities Act

A. Rule 12(b)(1) Standard

A motion to dismiss an action for lack of subject matter jurisdiction is properly brought under Fed. R. Civ. P. 12(b)(1). The objection presented by this motion is that the Court has no authority to hear and decide the case. When considering a Rule 12(b)(1) motion challenging the substance of jurisdictional allegations, the Court is not restricted to the face of the pleadings, but may review any evidence, such as declarations and testimony, to resolve any factual disputes concerning the existence of jurisdiction. See *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

B. Foreign Sovereign Immunities Act — General Rule

The FSIA is the sole basis for jurisdiction over a foreign state and its agencies and instrumentalities. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683 (1989). Under the FSIA, foreign states are presumed to be immune from the jurisdiction of the

United States courts unless one of the FSIA's exceptions applies. 28 U.S.C. § 1604.

C. Burden of Proof Under FSIA

If a plaintiff's allegations and uncontroverted evidence establish that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017, 113 S. Ct. 1812 (1993).

D. Applicability of FSIA to pre-1952 Events

1. The Tate Letter

Until 1952, foreign states and their agencies and instrumentalities were absolutely immune from suit in United States courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962 (1983); *Siderman de Blake*, 965 F.2d at 705. In 1952, the Acting Legal Adviser of the State Department, Jack Tate, sent a letter ("the Tate Letter") to the Acting Attorney General announcing that the State Department was adopting the restrictive principle of foreign sovereign immunity. *Verlinden*, 461 U.S. at 487, n.9. Under the restrictive principle of sovereign immunity, the immunity of a foreign sovereign is recognized with regard to a sovereign's public acts (*jure imperii)*, but is not recognized with respect to a sovereign's private acts (*jure gestionis*). *Siderman de Blake*, 965 F.2d at 705 (citations omitted).

The Tate Letter, while announcing this new policy, did not provide courts with concrete standards for determining whether to assert jurisdiction over suits against foreign states. *Id.* In 1976, with the passage of the FSIA, Congress provided such standards. *Id.* The FSIA codified the restrictive theory of sovereign immunity and conferred subject matter jurisdiction over claims against foreign sovereigns on the United States courts. *Id.*; H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6613.

2. Defendant's Position — FSIA Does Not Apply to Pre-1952 Events

Defendants argue that because the FSIA was meant to codify the restrictive principle of sovereign immunity, and because this policy was not adopted until 1952, the FSIA is not applicable to actions that occurred prior to 1952. Defendants contend, therefore, that they are entitled to absolute sovereign immunity in accordance with the State Department's policy prior to the issuance of the Tate Letter. Defendants' position is not without support.

The Eleventh Circuit first considered this issue in 1986. *See Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917, 107 S. Ct. 371 (1987). At issue in *Jackson* were claims regarding bearer bonds issued by the Imperial Government of China in 1911 that were to mature in 1951. *Id.* at 1497. The Eleventh Circuit affirmed the district court's holding that the FSIA did not confer jurisdiction for actions prior to the issuance of the Tate Letter. *Id.* The Eleventh Circuit reasoned that courts normally presume that legislative enactments are to apply

prospectively, and that there was no reason to deviate from this presumption because the FSIA was not intended to affect the substantive law of liability. *Id.* The Eleventh Circuit agreed with the district court's reasoning that to apply the FSIA to pre-1952 events would interfere with China's established expectations of absolute immunity. *Id.* Therefore, the Eleventh Circuit concluded, the FSIA did not apply to pre-1952 events. *Id.* at 1499.

In 1985, the District Court for the District of Columbia relied on *Jackson* and held that the FSIA did not apply to a claim based on a 1922 agreement between the plaintiff and the United States of Mexico. *Slade v. United States of Mexico*, 617 F. Supp. 351, 356 (D.D.C. 1985). The district court in *Slade*, like the Eleventh Circuit in *Jackson*, reasoned that the presumption of prospective application of legislative enactments supported Mexico's position that the FSIA did not apply to pre-1952 events. *Id.* at 356. The *Slade* court also had the same concerns as the *Jackson* court regarding interfering with the foreign sovereign's established expectations of absolute immunity. *Id.* at 357. Later, in 1993, the District Court for the District of Columbia again held, relying on *Jackson* and *Slade*, that the FSIA was inapplicable to pre-1952 events. *Djordevich v. Bundeminister Der Finanzen, Federal Republic of Germany*, 827 F. Supp. 814 (D.D.C. 1993). This case was affirmed by the District of Columbia Circuit on other grounds.

In 1988, the Second Circuit relied on *Jackson* and *Slade* and held that the Union of Soviet Socialist Republics ("USSR") was absolutely immune from claims based on debt instruments issued by the Russian Imperial Government in

1916 because the claims arose prior to the issuance of the Tate Letter. *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1988), *cert. denied*, 487 U.S. 1219, 108 S. Ct. 2874 (1988). The Court noted that a retroactive application of the FSIA would adversely affect the USSR's settled expectation of immunity from suit in the United States courts. *Id.*

Although the Defendants' position on the FSIA's applicability to pre-1952 events is supported by case law, the continued viability of these cases is in doubt in light of the United States Supreme Court's subsequent decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994). *Landgraf*, as well as cases decided after *Landgraf* regarding the FSIA's application to pre-1952 events, lead the Court to conclude that the FSIA applies to pre-1952 events.

E. *Landgraf v. USI Film Products, Inc.*

In *Landgraf*, the United States Supreme Court held that in determining whether to apply a legislative enactment to events that occurred prior to the enactment, a court must first consider whether Congress expressly stated the statute's reach. *Landgraf*, 511 U.S. at 280. If Congress has made no expression of its intent, the court must then determine whether, if applied to events that preceded the enactment's effective date, the statute would have a "retroactive effect"; i.e., whether it would impair rights a party possessed when he acted, impose new duties on a party, or increase a party's liability for past conduct. *Id.* Statutes conferring jurisdiction generally do not have a retroactive effect. *Id.* at 274

("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed"). "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " *Id.* (citation omitted).

The *Landgraf* case noted the tension between two principles of statutory interpretation. The first principle is that normally a court is to apply the law in effect at the time it renders a decision. *Id.* at 264. The second principle is that cited by the *Jackson*, *Carl Marks*, and *Slade* cases: Retroactivity of legislative enactments is not favored in the law. *Landgraf*, 511 U.S. at 264. In its discussion of retroactive application of jurisdictional statutes, the Supreme Court noted that the first principle — application of present law — is the most relevant. "Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than the rights or obligations of the parties.' " *Id.* (citation omitted). Thus, the Supreme Court rejected the rationale that was employed by the *Jackson*, *Carl Marks*, and *Slade* courts in situations involving the question of retroactivity of jurisdictional statutes. In these situations, the Supreme Court favors applying the law in effect at the time of the decision.

The FSIA does not affect any substantive law determining the liability of a foreign state or instrumentality. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S. Ct. 2591 (1983). *See also* H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin. News at 6610 ("The bill is not intended to affect the

substantive law of liability.").[14] This favors applying the FSIA to pre-1952 events. *See Jeffries v. Wood*, 114 F.3d 1484

14. *But see Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S. Ct. 1962 (1983). The *Verlinden* Court rejected a constitutional challenge to the FSIA and held that a claim brought pursuant to the FSIA "arises under" federal law as that term is used in Article III of the United States Constitution. In arriving at this conclusion, the Court noted that the FSIA is more than a mere jurisdictional statute:

> As the House Report clearly indicates, the primary purpose of the act was to "set forth comprehensive rules governing sovereign immunity" . . . ; the jurisdictional provisions of the Act are simply one part of this comprehensive scheme. The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law, . . . and applying those standards will generally require interpretation of numerous points of federal law.

Id. at 496-97 (citations omitted). At first glance, the above-quoted passage from *Verlinden* seems at odds with *First Nat'l City Bank*'s pronouncement that the FSIA was not intended to affect the substantive law determining the liability of a foreign state. These cases, however, were decided in the same session of the United States Supreme Court, and were issued within one month of each other. *See Verlinden*, 461 U.S. at 480 (decided May 23, 1983); *First Nat'l City Bank*, 462 U.S. at 611 (decided June 17, 1983). Presumably, therefore, any inconsistencies between the two decisions would have been resolved prior to the issuance of *First Nat'l City Bank*. A closer reading of *Verlinden* leads the Court to the conclusion that there is no inconsistency between the two decisions.

(Cont'd)

(9th Cir.) (en banc) (noting that *Landgraf* identified statutes that confer or oust jurisdiction as an example of statutes that generally do not have a retroactive effect), *cert. denied*, 522 U.S. 1008, 118 S. Ct. 586 (1997). Other courts that have, after *Landgraf*, considered the applicability of the FSIA to pre-1952 events have suggested or concluded that the FSIA should apply to pre-1952 events. In 1994, the District of Columbia Circuit addressed the issue in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121, 115 S. Ct. 923 (1995). There, the court noted that there is a strong argument in favor of applying the FSIA to pre-1952 events. *Id.* at 1170. The FSIA provides

(Cont'd)

The *Verlinden* Court reasoned that the FSIA was within Congress' Article I power to regulate foreign commerce, and that the FSIA was within the Article III limitations on the power of the judiciary because claims against foreign sovereigns would necessarily arise under federal law.

> Congress, pursuant to its unquestioned Article I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. In so doing, Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into the federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states. ***The resulting jurisdictional grant is within the bounds of Article III, since every action against a foreign sovereign, necessarily involves application of a body of substantive federal law, and accordingly "arises under" federal law, within the meaning of Article III.***

Id. at 497 (emphasis added).

that "[c]laims of foreign states to immunity should ***henceforth be decided*** by courts of the United States . . . ***in conformity with the principles set forth in this chapter***." 28 U.S.C. § 1602 (emphasis added). This language, the *Princz* court stated, suggests that the FSIA is to be applied to all cases decided after its enactment regardless of when the plaintiff's cause of action may have accrued. *Princz*, 26 F.3d at 1170. The *Princz* court also noted that this result is supported by *Landgraf* because the FSIA is a jurisdictional statute that does not alter substantive legal rights.[15] *Id.* at 1171.

Later, in 1999, the District of Columbia Circuit held that a 1988 amendment to the FSIA could be applied to events preceding the amendment's enactment. *Creighton Limited v. Government of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999). The court reasoned that the amendment was jurisdictional in nature and that therefore, under *Landgraf*, could be applied under the principle of statutory interpretation requiring the court apply the law in effect at the time it renders a decision. *Id.* at 124.

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15. Defendants correctly note that *Lin v. Government of Japan*, No. 92-2574, 1994 WL 193948 (D.D.C., May 6, 1994), held that the FSIA should not be applied to pre-1952 events. The *Lin* court explicitly noted that *Landgraf* did not require a contrary result. *Id.* at *12. However, *Lin* is not persuasive for two reasons. First, the decision itself is not a published decision and is therefore of little precedential value in light of the District of Columbia Circuit's Rule 28(c), which prohibits the citation of this case as precedent to the District of Columbia. Second, *Lin* was decided before *Princz* and *Creighton*, in which the District of Columbia Circuit noted that, under *Landgraf*, application of the FSIA to pre-1952 events is appropriate.

A district court in the Northern District of Illinois relied on *Princz* and *Creighton* and held that the FSIA could be applied to pre-1952 events. *Haven v. Rzeczpospolita Polska (Republic of Poland)*, 68 F. Supp. 2d 943, 945 (N.D. Ill. 1999) (denying Poland's motion to dismiss claims based on allegations of expropriation of real property during and shortly after World War II). Although the *Haven* court noted that the determination of whether to apply the FSIA to pre-1952 events was a difficult question to resolve, the court noted that the post-*Landgraf* cases of *Princz* and *Creighton* were more persuasive than the pre-*Landgraf* cases of *Jackson* and *Carl Marks*. This Court agrees.

For these reasons, the Court holds that the FSIA applies to pre-1952 events.[16]

F. Expropriation Exception to Sovereign Immunity

1. An Exception of the FSIA Must Apply

Even though the FSIA applies to pre-1952 events, one of the exceptions to the FSIA's general rule of immunity must

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16. Both parties seem to assume that only pre-1952 conduct is at issue in this action. Indeed, the conduct of Gallery officials in the late 1940s is relevant, but other conduct — well after 1952 — is at issue as well. Plaintiff's claims include allegations that Austria concealed the true ownership of the paintings from her and the other heirs even after 1952. The expropriation exception to foreign sovereign immunity concerns itself with property taken in violation of international law, rather than the taking of property in violation of international law. *See infra*, section III.F.2. These post-1952 acts also establish jurisdiction under the expropriation exception to foreign sovereign immunity.

apply, or Austria is entitled to sovereign immunity. Plaintiff claims that the "expropriation exception" to the FSIA applies. *See* 28 U.S.C. § 1605(a)(3). That exception provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. . . .

Id.

This exception has two distinct clauses, separated by a semi-colon. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6613. The first clause "involves cases where the property in question or any property exchanged for such property is present in the United States." *Id.* Because the Klimt paintings are not present in the United States, the first clause does not apply.

The second clause involves cases in which "the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in

commercial activity in the United States. Under the second [clause], the property need not be present [in the United States] in connection with a commercial activity of the agency or instrumentality." *Id.*

This exception has three distinct requirements. First, there must be property taken in violation of international law — i.e., the property must have been expropriated. Second, the property must be "owned or operated by an agency of or instrumentality of a foreign state. . . ." Finally, the agency or instrumentality must be engaged in commercial activity in the United States.

2. Property Must Be Taken In Violation of International Law

At the jurisdictional stage, a court need not determine if property was taken in violation of international law; so long as the plaintiff's claims are substantial and non-frivolous, there is a sufficient basis for the exercise of the court's jurisdiction. *Siderman de Blake*, 965 F.2d at 711. The foreign state against whom a claim is made need not be the sovereign that expropriated the property at issue. *See* 28 U.S.C. § 1605(a)(3) (excepting claims regarding property "taken in violation of international law" rather than excepting claims against foreign states that have taken property in violation of international law).

There are three requisites to a valid taking under international law. *Id.* First, the taking must serve a public purpose; second, aliens must not be discriminated against or singled out for regulation by the state; and third, payment of just compensation must be made. *Id.* at 711-12.

Here, Plaintiff's allegations establish a substantial and non-frivolous claim that a taking in violation of international law occurred on at least two occasions. First, the Nazi "aryanization" of Ferdinand's art collection by the Nazis is undeniably a taking in violation of international law. The taking was not for public purpose; instead, some of the art was distributed to the collections of Hitler, Göring, and Dr. Fürher. Other art was sold for the benefit of the Nazi party.[17] Moreover, the Nazi's aryanization of art collections was part of a larger scheme of the genocide of Europe's Jewish population, and it requires no semantic stretch to characterize this program as singling out "aliens" for regulation by the state. Finally, no payment of just compensation was made as a result of this taking.

Next, Plaintiff has established a substantial and non-frivolous claim that a taking in violation of international law occurred when the paintings were "donated" to the Gallery in 1948 in order to secure export licenses for other works of art. These paintings were not taken for a public purpose; Austria's own laws required their return to their rightful owners. Moreover, Austria's acknowledged practice of requiring export licenses for works of art stolen by the Nazis

17. Nazi Germany is not recognized as a valid foreign sovereign. *See Weiss v. Lustig*, 58 N.Y.S.2d 547 (1945) (refusing to recognize Nazi decree as the law of a sovereign state); *Kalmich v. Bruno*, 450 F. Supp. 227 (N.D. Ill. 1978) (holding that the act of state doctrine did not apply to actions of Nazi occupation forces in Yugoslavia because this doctrine applies only to the acts of a sovereign in its own territorial jurisdiction and not to the acts of belligerent force, during wartime, in an occupied territory of an enemy nation).

singled out aliens for regulation by the state because aliens would be much more likely to seek export of these artworks than would Austrian citizens. Additionally, because Austria's laws required the return of these artworks to their rightful owners, the exchange of certain works of art for export permits on other works of art cannot be viewed as just compensation.

Therefore, Plaintiff has made out a substantial and non-frivolous claim that these works of art were taken in violation of international law.

Defendants argue that Plaintiff must first exhaust her domestic remedies regarding her claims for the artworks before seeking the intervention of the United States courts. A plaintiff cannot complain that a taking has not been fairly compensated unless the plaintiff has first pursued and exhausted the domestic remedies in the foreign state that is alleged to have caused the injury. *Greenpeace, Inc. v. State of France*, 946 F. Supp. 773, 783 (C.D. Cal. 1996). However, this exhaustion requirement is excused when the domestic remedies are a sham, are inadequate, or would be unreasonably prolonged. Restatement (Third) of Foreign Relations Law, § 713, cmt. f (1986). For the reasons stated below in section IV, regarding the doctrine of *forum non conveniens*, the Court finds that the Austrian courts provide an inadequate forum for resolution of Plaintiff's claims.

For these reasons, Plaintiff's claim meets the "taking" requirement of the expropriation exception of the FSIA.

3. Property Must Be Owned or Operated by Agency or Instrumentality of a Foreign State

The FSIA defines an "agency or instrumentality of a foreign state" as any entity that is a separate legal person, that is an organ of a foreign state, and that is not a citizen of the United States or created under the laws of any third country. Until January 1, 2000, the Gallery was an agency or instrumentality of a foreign state. On January 1, 2000, the Gallery was privatized and is no longer an organ of the Republic. Nevertheless, this change in the structure of the Gallery's operations does not divest this Court of subject matter jurisdiction because the events in question occurred prior to the Gallery's privatization. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995) (holding that jurisdiction under the FSIA over an Israeli company was appropriate where Israel owned a majority of shares of the company when plaintiffs were injured by the company's products even though subsequent changes in ownership resulted in the company no longer being considered "an agency or instrumentality" of Israel).

The paintings are owned by the Republic, but are exhibited by the Gallery. The exhibition of these paintings fulfills the "owned or operated by an agency or instrumentality" requirement. *See, e.g., Siderman de Blake*, 965 F.2d at 712.

Therefore, Plaintiff's claim meets the "owned or operated" requirement of the expropriation exception of the FSIA.

4. The Agency or Instrumentality Must Be Engaged in Commercial Activity

Finally, the agency or instrumentality must be engaged in commercial activity in the United States. "Commercial activity" is defined by the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). "The commercial character of an activity [is] determined by reference to the nature of the course of conduct of a particular transaction or act, rather than by reference to its purpose." *Id.* "[W]hen a foreign government acts . . . in a manner of a private player within [the market], the foreign sovereign's acts are "commercial" within the meaning of the FSIA." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S. Ct. 2160 (1992) (holding that the issuance of bonds by the Republic of Argentina was a "commercial activity" within the meaning of the FSIA). In determining whether a sovereign's acts are commercial, the focus of the inquiry is not whether the sovereign acts with a profit motive; "[r]ather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the ***type*** of actions by which a private party engages in trade and traffic or commerce." *Id.* (citations and internal quotation marks omitted; emphasis in the original). Therefore, while a sovereign's issuance of regulations limiting foreign currency exchange is a sovereign activity (because a private party could not ever exercise this authority), a contract by a sovereign to buy army boots or weapons is a commercial activity (because private companies can contract to acquire goods). *Id.*

Therefore, the issue before the court is whether the type of actions engaged in by the Gallery in the United States constitutes "commercial activity."[18] According to the allegations in the Complaint, the Gallery publishes a museum guidebook in English available for purchase by United States citizens, including those in the Central District, and the Gallery's collection, including the paintings at issue in this action, is advertised in the United States, including in the Central District. Moreover, the Gallery is visited by thousands of United States citizens each year, including United States citizens that reside in the Central District. Additionally, the Gallery has lent *Adele Bloch-Bauer I* to the United States in the past.

Plaintiff argues that operating a museum is an activity in which private parties engage. Indeed, the privatization of the Gallery in January 2000 bears out this argument. *Cf. Aschenbrenner v. Conseil Regional de Haute-Normandie*, 851 F. Supp. 580, 584 (S.D.N.Y. 1994) (holding that an art exposition was not a "commercial activity" within the meaning of the FSIA). Plaintiff's argument is well-founded, even though the Gallery itself operates on foreign soil. In *Siderman de Blake*, the Ninth Circuit held that a government-expropriated hotel's solicitation of American guests, the hotel's entertainment of those guests, and the acceptance of payment from credit cards and traveler's checks of those

18. The language of § 1605(a)(3) seems to limit the Court's inquiry to the nature of the activities of the agency or instrumentality, rather than to the sovereign ***and*** its agencies or instrumentalities. However, because the Court concludes that the Gallery engages in commercial activity within the meaning of the FSIA, the Court need not decide today whether this exception is so limited.

guests was sufficient commercial activity to confer jurisdiction under the FSIA. *Siderman de Blake*, 965 F.2d at 712. The Court concludes that under *Siderman de Blake*, the Gallery engages in commercial activity under the FSIA.

The Gallery also engages in commercial activity by publishing its guidebook that is available for purchase in the United States. *See Aschenbrenner*, 851 F. Supp. at 584 (suggesting that publication of a book containing photographs of an artist's works was a commercial activity). The Gallery also engages in commercial activity by advertising in the United States. *See Holden v. Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996) (holding that promotion of products in the United States by an employee hired by a foreign sovereign constituted commercial activity because private parties engage in product promotion), *cert. denied*, 519 U.S. 1091, 117 S. Ct. 767 (1997).

Defendants argue that even if the Gallery engages in commercial activity, the Court still does not have jurisdiction over the Republic. Defendant's argument is based on the assumption that the Court may exercise jurisdiction over a foreign sovereign under only the first clause of the expropriation exception, which requires that the property be present in the United States and which is inapplicable to the present claims.

This argument, however, ignores the language of § 1605(a). All the enumerated exceptions to the FSIA in § 1605(a) clearly relate to when a court may exercise jurisdiction over a foreign state. Section 1605(a) begins with the clause "(a) A foreign state shall not be immune from the

jurisdiction of courts of the United States or of the States in any case . . . ," and then goes on to list a number of circumstances in which sovereign immunity is inapplicable. The second clause of § 1605(a)(3) should be read in the disjunctive, so that a foreign state shall not be immune when expropriated property is owned or operated by the foreign state's agency or instrumentality when that agency or instrumentality engages in commercial activity in the United States. Defendants' reading of the second clause of § 1605(a)(3), limiting immunity to the agency or instrumentality, is not consistent with the language of the statute or its legislative history.[19]

For these reasons, the Court concludes that the expropriation exception to the FSIA applies to Plaintiff's claims, and Austria is not entitled to immunity.

III. Personal Jurisdiction

Defendants also argue that even if an exception to sovereign immunity applies, Plaintiff's suit still cannot be maintained unless the Court has personal jurisdiction over the Republic and the Gallery.

The legislative history of the FSIA reveals that the intent of Congress was that if one of the FSIA exceptions to immunity existed, the constitutional due process requirements of personal jurisdiction were satisfied. H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.

19. Moreover, the FSIA defines a "foreign state" as including its agencies and instrumentalities. *See* 28 U.S.C. § 1603(a).

Code & Admin. News at 6613 ("Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States. These immunity provisions, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.")

Until 1992, Ninth Circuit authority had suggested that the Court would be required in a case involving FSIA to engage in a "minimum contacts" analysis. *See Siderman de Blake*, 965 F.2d at 704 n.4 ("[T]he exercise of personal jurisdiction also must comport with the constitutional requirement of due process"); *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir. 1989) ("[I]f defendants are not entitled to immunity under the FSIA, a court must consider whether the constitutional constraints of the Due Process Clause preclude the assertion of personal jurisdiction over them."), *cert. denied*, 493 U.S. 891, 110 S. Ct. 237 (1989). Later case law, decided after the United States Supreme Court's decision in *Weltover*, suggests a different approach.

In *Weltover*, the Court explicitly declined to decide whether a foreign state is a "person" under the Due Process Clause because it found that due process had been satisfied. The Court cited to *Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S. Ct. 803 (1966), which held that States of the Union are not "persons" for purposes of the Due Process Clause. This citation suggests that the Court, in a case that properly presents the issue, would hold that foreign sovereigns are not entitled to due process protection.

Appendix B

Other courts, including the Ninth Circuit, have since explicitly declined to decide whether foreign sovereigns are "persons" under the Due Process Clause. *Theo. H. Davies & Co., Ltd. v. Republic of the Marshall Islands*, 174 F.3d 969 (9th Cir. 1999); *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000); *Hanil v. PT. Bank Negara Indonesia*, 148 F.3d 127, 130 (1998). In *Theo. H. Davies*, in light of the suggestion in *Weltover* that foreign sovereigns are not "persons" for purposes of the Due Process Clause, the Ninth Circuit significantly altered its previous approach and assumed, but did not decide, that foreign states are entitled to due process protection. *Theo. H. Davies*, 174 F.2d at 975 n.3 (citing *Weltover*).

Many courts considering whether they had personal jurisdiction over a foreign sovereign since *Weltover* have not been required to determine if the Due Process Clause applies to foreign sovereigns because those courts have been able to conclude without much analysis that due process has been satisfied. *See Theo. H. Davies*, 174 F.3d at 974-76; *Republic of Yemen*, 218 F.3d at 1303; *Hanil*, 148 F.3d at 130. This is because the more commonly employed exception to foreign sovereign immunity under the FSIA, the commercial activity exception, requires that the action be based on commercial activity carried on in the United States, connected with the United States, or that has a direct effect on the United States. *See* 28 U.S.C. § 1605(a)(2). When these requirements have been met, courts have been able to conclude that they have personal jurisdiction over the foreign sovereign by virtue of these contacts with the United States and that therefore the due process requirements for personal jurisdiction have been satisfied. *See Theo. H. Davies*, 174 F.3d at 974-76; *Republic of Yemen*, 218 F.3d at 1303; *Hanil*, 148 F.3d at 130.

Appendix B

It is less clear whether sufficient activity to satisfy the expropriation exception to foreign immunity would also satisfy due process. However, such an analysis is not required because foreign sovereigns are not "persons" for purposes of the Due Process Clause. As previously noted, Ninth Circuit case law prior to *Weltover*, by requiring a "minimum contacts" analysis, had implicitly held that foreign sovereigns are "persons" entitled to due process. *See Siderman de Blake*, 965 F.2d at 704 n.4; *Gregorian v. Izvestia*, 871 F.2d 1515. The Ninth Circuit has since retreated from this implicit holding by following the *Weltover* court's lead in assuming without deciding that due process was satisfied. *Theo. H. Davies*, 174 F.2d at 975 n.3 (citing *Weltover*).

The District Court for the District of Columbia has considered this issue in depth and has concluded that foreign sovereigns are not "persons" within the meaning of the Due Process Clause. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C.1998); *World Wide Minerals, Ltd. v. Republic of Kazakhstahn*, 116 F. Supp. 2d 98 (D.D.C. 2000) (following *Flatow*); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 49 (D.D.C. 2000) (following *Flatow* and noting that it would seem that a foreign sovereign should enjoy no greater due process rights than the sovereign states of the union). This Court finds the *Flatow* court's rationale persuasive.

The *Flatkow* court first noted that most courts have simply assumed without deciding that a foreign sovereign is a "person" for purposes of constitutional due process analysis and that this assumption has rarely been examined in depth. *Flatow*, 999 F. Supp. at 19. The *Flatow* court cited *Aftam v. Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358,

1362 (7th Cir. 1985), which noted that an unexamined assumption regarding the ability of foreign corporations to object to extraterritorial assertions of personal jurisdiction was probably now "too solidly entrenched" to be questioned. The *Flatow* court rejected the notion that the unexamined assumption with which it was faced could not be questioned. So, too, does this Court.

The United States Supreme Court has held that a State of the United States is not entitled to substantive due process. *Katzenbach*, 383 U.S. at 323-24. Similarly, the United States Supreme Court has noted that "in common usage, the term 'person' does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304 (1989) (internal alterations and citations omitted); *see also Rios v. Marshall*, 530 F. Supp. 351, 372 (S.D.N.Y. 1981) (holding that foreign states are not "persons" subject to antitrust liability under the Sherman Act).

Several courts have held that the federal government, state governments, political subdivisions and municipalities within the United States are not "persons" within the meaning of the Due Process Clause. *See In re Herndon*, 188 B.R. 562, 565 n.8 (E.D. Ky. 1995) ("The Fifth Amendment accords due process of law to persons. A governmental entity is not a 'person.' The Fifth Amendment protects persons from the government; its does not necessarily protect one branch of the government from the actions of another branch."); *El Paso County Water Imp. Dist. No. 1 v. International Boundary and Water Comm'n*, 701 F. Supp. 121 (W.D. Tex. 1988); *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp.

157 (D.D.C. 1980); *State of Oklahoma v. Federal Energy Regulatory Comm'n*, 494 F. Supp. 636 (D.C. Okla. 1980), *aff'd on other grounds*, 661 F.2d 832 (10th Cir. 1981), *cert. denied sub nom., Texas v. Federal Energy Regulatory Comm'n*, 457 U.S. 1105, 102 S. Ct. 2902 (1982).

The personal jurisdiction requirement recognizes an individual liberty interest that is conferred by the Due Process Clause. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S. Ct. 2099 (1982). The personal jurisdiction requirement represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. *Id.* "It would be illogical to grant this personal liberty interest to foreign states when it has not been granted to federal, state or local governments of the United States." *Flatow*, 999 F. Supp. at 21. Accordingly, this Court holds that a foreign state is not a "person" under the Due Process Clause of the United States Constitution.

The previously-cited House Report's language is unambiguous — it states that *in personam* jurisdiction has been addressed within the requirements of the statute; the FSIA does not grant a liberty interest for the purposes of substantive due process analysis. H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6611-12. This Court joins with the *Flatow* court's observation that "[f]oreign sovereign immunity, both under the common law and now under the FSIA, has always been a matter of grace and comity rather than a matter of right under United States law." *Verlinden*, 461 U.S. at 486, *citing Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116,

3 L.Ed. 287 (1812). Where neither the Constitution nor Congress grants a right, it is inappropriate to invent and perpetuate it by judicial fiat.

IV. Effect of International Agreements on the FSIA

Defendants correctly argue that the FSIA must be interpreted subject to international agreements that were in existence at the time of the FSIA's enactment. Defendants argue that Plaintiff's claims are barred by Articles 21 and 26 of the Austrian State Treaty of 1955, 6 UST 2369, and The 1959 Austrian Exchange of Notes Constituting an Agreement Concerning the Settlement of Certain Claims under Article 26 of the Austrian State Treaty ("1959 Agreement").

Plaintiff correctly points out, however, that Article 21 of the 1955 Treaty, providing that Austria would not be required to make reparations for damages arising out of the existence of war after September 1, 1939, was an agreement that Austria need not make reparations to the Allied Forces. Other provisions of this Treaty concern themselves with Austria's responsibility regarding the return of property improperly seized from its citizens during the Nazi invasion.

The second paragraph of Article 26 concerns only heirless or unclaimed property. The paintings at issue are neither. The 1959 Agreement established a fund for settlement of certain enumerated claims, e.g., pensions, insurance policies, and bank accounts, but works of art were not among these enumerated claims. Moreover, the United States government explicitly reserved the right to pursue unknown claims.

Therefore, the existing international agreements at the time the FSIA was enacted do not require granting immunity to Austria as to Plaintiff's claims; in fact, these international agreements placed responsibility on Austria to return property that was improperly seized by the Nazis.

V. *Forum Non Conveniens*

Defendants argue that Plaintiff's claims should be dismissed under the doctrine of *forum non conveniens*. Plaintiff argues that this doctrine should not be applied because no reasonable alternative forum exists.

Under the doctrine of *forum non conveniens*, a district court "may decline to exercise its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S. Ct. 252 (1981). The party moving for dismissal under the doctrine of *forum non conveniens* must demonstrate the existence of an adequate alternative forum and that the balance of relevant private and public interest factors favor dismissal. *Creative Technology, Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995). The existence of the availability of an adequate alternative forum is a threshold issue, and dismissal is not appropriate if such a forum is unavailable. *See id.* Even though a court may not dismiss on *forum non conveniens* grounds when the foreign forum does not provide the same range of remedies as are available in the home forum, the alternative forum must provide some potential avenue for redress. *Ceramic Corp. of America v.*

Inka Maritime Corp., 1 F.3d 947, 949 (9th Cir. 1993). A foreign forum is inadequate when it offers no remedy at all. *See, e.g., El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677-78 (D.C.Cir. 1996). Austria does not provide an adequate alternative forum to Plaintiff. Plaintiff's claims, if asserted in Austria, will most likely be barred by the statute of limitations of thirty years.[20] Because of California's "discovery rule" with regard to stolen works of art, and assuming as true the allegations in the Complaint, Plaintiff would not be barred on statute of limitations grounds in this forum.[21] If Plaintiff's claims are barred by the statute of limitations, she would be left without a remedy; clearly, therefore, Austria is not an adequate alternative forum for Plaintiff's claims.

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20. Defendants argue that the statute of limitations is tolled for fraudulent concealment. Significantly, however, Defendants have refused to waive their statute of limitations defense to Plaintiff's claims. Defendants rely on *Kilvert v. Tambrands, Inc.*, 906 F. Supp. 790 (S.D.N.Y. 1995) in support of their motion to dismiss on *forum non conveniens* grounds; however, the *Kilvert* court dismissed the action only after the defendants agreed to waive their statute of limitations defense. Defendants' failure to agree to waive this defense is indicative of a belief that Plaintiff's claims are barred by the statute of limitations.

Defendants also argue that Plaintiff's claim under the 1998 law would not be barred based on the statute of limitations. However, Defendants' argument ignores the fact that the 1998 law created no private right of action. Defendants contend that regardless of whether the 1998 law created a private right of action, the Austrian Constitution permits a claim for the discriminatory application of this claim. However, that claim is not currently before the Court.

21. *See supra note* 10.

Further, in this action for return of artwork valued at approximately $150 million, Austria's filing fees, even when reduced pursuant to Plaintiff's fee petition, also makes Austria an inadequate alternative forum. Austria's fee structure would require Plaintiff to pay the Austrian courts a filing fee that approximates the sum total of her liquid assets. This amount varies between approximately $130,000 to $200,000, depending on the exchange rate. Additionally, in the event Plaintiff loses, Plaintiff would be required to pay costs, including attorney's fees, to the Republic and the Gallery.[22] A foreign forum's requirement that the plaintiff post a bond to proceed with litigation will generally not make the forum inadequate, unless the plaintiff is indigent or the excessively high amount of the bond makes it unduly burdensome. *See* 17 *Moore's Federal Practice*, § 111.74[2][d] (Matthew Bender 3d ed.); *see also Nai-Chao v. Boeing Co.*, 555 F. Supp. 9 (N.D. Cal. 1982), *aff'd sub nom., Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983) (noting that filing fee did not automatically render foreign forum inadequate); *cert. denied*, 464 U.S. 1017, 104 S. Ct. 549 (1983).[23] Here, it is clear that Plaintiff is not indigent. Nevertheless, the Court

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22. Plaintiff would be unlikely to prevail in Austria, given the statute of limitations difficulties discussed above.

23. Defendants argue that *Cheng* requires dismissal of Plaintiff's claims. In *Cheng*, the district court held that a foreign forum was adequate for purposes of *forum non conveniens* analysis notwithstanding its burdensome filing fees, so long as the filing fees were not oppressively burdensome. The Ninth Circuit found no abuse of discretion in the district court's conclusion, but did not separately consider the district court's holding with regard to the filing fee. Therefore, *Cheng* is not controlling authority on this issue.

finds that the filing fee required by the Austrian courts is oppressively burdensome. Paying even the reduced amount would force an 85-year-old woman to expend a great majority, if not all, of her liquid assets. Moreover, Austria has appealed the reduction in filing fees, and contends that Plaintiff should be required to pay an even greater amount.

For these reasons, Defendants have failed to demonstrate that Austria provides an adequate alternative forum and therefore the Court will not dismiss Plaintiff's claims under the doctrine of *forum non conveniens*.

VI. Joinder of Necessary and Indispensable Parties

Defendants argue that the present action must be dismissed pursuant to Fed. R. Civ. P. 19(a) because Plaintiff has failed to join necessary parties.

A. Text of Rule 19(a)

Rule 19(a) provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

Rule 19(a) provides three separate circumstances in which a person is to be considered a person to be joined if feasible (commonly referred to as "a necessary party"). First, a person is a necessary party if in the person's absence complete relief cannot be accorded among those already parties. Fed. R. Civ. P. 19(a)(1). The second and third circumstances share a common preliminary requirement: The person must claim an interest relating to the subject of the action. Fed. R. Civ. P. 19(a)(2). The second circumstance in which a person is a necessary party is when the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest. Fed. R. Civ. P. 19(a)(2)(i). Third, a person is a necessary party if the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence leaves any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Fed. R. Civ. P. 19(a)(2)(ii). If any one of these three circumstances apply, the person is a necessary party. *Shimkus v. Gersten Cos.*, 816 F.2d 1318, 1322 (9th Cir. 1987).

B. Rule 19(a)(1)

The "complete relief" clause of Rule 19(a) addresses the interest in comprehensive resolution of a controversy and the desire to avoid multiple lawsuits regarding the same cause of action. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983). Nevertheless, this provision is concerned only with "relief as between the persons already parties, not as between a party and the absent person whose joinder is sought." *Eldredge v. Carpenters 46 N. Cal. Counties Jt. Apprenticeship and Training Comm.*, 662 F.2d 534, 537 (9th Cir. 1981), *cert. denied*, 459 U.S. 917, 103 S. Ct. 231 (1982). The present action would resolve all claims between those already party to the present action; the presence of the other heirs is not required to fully adjudicate Plaintiff's claim to the paintings. This is so notwithstanding that others may assert an interest in the paintings as well.[24]

The Third Circuit has held that a party is not a necessary party based on the fact that the party might have a claim as to the property at issue in an *in rem* action. *Sindia Expedition, Inc. v. The Wrecked and Abandoned Vessel Known as the Sindia*, 895 F.2d 116 (1990) (holding that the state was not a necessary party in a controversy regarding a salvaged shipwrecked vessel based on state's assertion of ownership rights in the vessel and noting that "[t]he possibility that a successful party may have to defend its rights to the [vessel]

24. The heirs do not dispute the proportional share due to each of them; therefore, collectively, the heirs do not assert greater than a 100% interest in the paintings.

in a subsequent suit brought by the State does not make [the state] a necessary party"). By the same token, that the absent parties here may later claim an interest in the subject of the action — the paintings — does not make them necessary parties.

The heirs are not necessary parties within the meaning Fed. R. Civ. P. 19(a)(1).

C. Rule 19(a)(2)

Under both clauses of Rule 19(a)(2), the absent party must claim an interest relating to the subject matter of the action. This interest may be a legally protected interest or an interest that "is to be determined from a practical perspective." *Aguilar v. Los Angeles County*, 751 F.2d 1089 (1985), *cert. denied*, 471 U.S. 1125, 105 S. Ct. 2656 (1985). The heirs undeniably have an interest relating to the subject matter of the action. This action seeks return of six paintings. Among them, the heirs have a 100% interest in the paintings. Plaintiff claims only a subset of this interest — 25%.

Nevertheless, the heirs do not "claim an interest" within the meaning of 19(a)(2). When persons are aware of an action but choose not to claim an interest by failing to join in the action, they are not considered necessary parties. *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (holding that the district court did not err by finding that a party who was aware of an action but chose not to claim an interest was not a necessary party under Rule 19). For this reason, the heirs are not persons who claim an interest in the action and are therefore not necessary parties under Fed. R. Civ. P. 19(a)(2)(i) or (ii).

Even if this were not the case, however, the heirs would not be necessary parties under Rule 19(a)(2)(i) or (ii) for other reasons.

D. Rule 19(a)(2)(i)

The "impair or impede" clause of Rule 19(a)(2)(i) focuses on protecting the interest of the absent parties. Absent parties are not necessary parties if their interests are adequately represented by existing parties. *See, e.g., Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999). In *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992), *cert. denied*, 509 U.S. 903, 113 S. Ct. 2993 (1993), the Ninth Circuit considered three factors in determining whether an absent party would be adequately represented by existing parties.

First, the Court considers whether "the interests of a present party to the suit are such that it will undoubtedly make all" of the absent party's arguments. Here, the parties' claims to the paintings have the same genesis: All the heirs' claims to the paintings are based on their proportional inheritance (or their parent's proportional inheritance) of Ferdinand Bloch-Bauer's estate. The arguments supporting return of the paintings are common to all the heirs.

Next, the Court considers whether the party is "capable of and willing to make such arguments." The Court finds that Plaintiff is both capable of and willing to make all arguments in support of the heirs' claims. Plaintiff is aptly represented by counsel, and the heirs' interest is also partly advanced by amicus curiae Bet Tzedek.

Finally, the Court considers whether the absent party would "offer any necessary element to the proceedings" that the present parties would neglect to offer. Here, the absent parties would offer no additional element to the proceedings because, as explained above, the heirs' claims have a common genesis, and they have no disputes among themselves regarding the proportional interest of each.

Upon consideration of the factors enunciated by the Ninth Circuit, the Court finds that Plaintiff adequately represents the heirs' claims, and therefore, the heirs are not necessary parties under Rule 19(a)(2)(i).[25]

E. Rule 19(a)(2)(ii)

The "inconsistent obligations" clause of Rule 19(a)(2)(ii) focuses on the possibility that those already parties might be subjected to inconsistent obligations. This clause is concerned with inconsistent ***obligations***, not inconsistent ***adjudications.*** 4 *Moore's Federal Practice* § 19.03[4][d] (Matthew Bender 3d ed.). An action that merely determines the ownership rights of property does not expose any party to inconsistent obligations, notwithstanding the possibility that another party might later claim an interest in that property. *Sindia Expedition*, 895 F.2d at 123.

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25. Additionally, Plaintiff has received assignments of the rights to the paintings from three of the four other heirs. With these assignments, Plaintiff represents a 75% interest in the paintings.

F. Defendant's Remaining Arguments

Defendants also argue that, generally, joint obligees are to be considered indispensable parties in an action to set aside a contract. (Plaintiff asks the court to rescind any agreement between the Gallery and the Austrian lawyer to exchange the paintings for export permits). Defendants rely on *Nike, Inc. v. Comercial Iberica De Exclusivas*, 20 F.3d 987, 991 (9th Cir. 1994), for this proposition. In *Nike*, the Ninth Circuit noted, in dicta, that generally joint obligees are indispensable parties to an action. In *Nike*, the joint obligees were a subsidiary and its parent, and the court held that a subsidiary's assignment of rights to a parent was a collusive attempt to maintain diversity jurisdiction because the subsidiary's presence in the suit would destroy diversity. These concerns are not present in this action.

The *Nike* court relied on an earlier Fifth Circuit case that is also cited by Defendants. In *Harrell v. Sumner Contracting Co. v. Peabody Peterson Co.*, 546 F.2d 1227 (5th Cir. 1977), the court noted the general rule that joint obligees are indispensable parties. The court's rationale, however, was based on the fact that the plaintiff and the party to be joined were joint venturers and that federal courts had held that all partners are indispensable parties in actions based on partnership contracts. Additionally, like the *Nike* court, the Fifth Circuit was concerned with the plaintiff's collusive attempt to invoke the court's diversity jurisdiction. The present case is distinguishable from *Harrell*. First, because no partnership is involved, the weight of authority regarding partnership agreements and indispensability of partners upon which the Fifth Circuit relied is inapplicable here. Second,

there are no concerns with collusive attempts to invoke the Court's diversity jurisdiction because the action is properly before the Court on federal question jurisdiction. Third, there is ample reason for not applying the general rule in this action. As explained previously, the other heirs are aware of the action but have chosen not to participate and their interest will be adequately represented by Plaintiff. *Bowen*, 172 F.3d at 689; *Shermoen*, 982 F.2d at 1318. Therefore, *Harrell* is not persuasive authority on the issue of the indispensability of joint obligees.

Finally, Defendants rely on *Lomayaktew v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied sub nom., Susenkewa v. Kleppe*, 425 U.S. 903, 96 S. Ct. 1492 (1976) for the proposition that in an action to set aside a contract, all parties who may be affected by the determination of the action are indispensable. In *Lomayaktew*, the party held to be indispensable was the Hopi Tribe, which was the lessor of land in an action to void lease of land to coal mining company. In *Lomayaktew*, the Plaintiff could not be joined because of sovereign immunity. Later Ninth Circuit authority, however, leads the Court to find that application of this general rule to the present circumstances is inappropriate.

Cases decided since *Lomayaktew* have held that persons who do not join in an action despite knowing of the action do not claim an interest in the subject of the action and are therefore not necessary parties. *Bowen*, 172 F.3d at 689. Moreover, recent Ninth Circuit authority has also held that when, as here, the present parties will adequately represent the interests of the absent parties, the absent parties are not necessary parties. *Shermoen*, 982 F.2d at 1318. In the context

of this action, these cases are more persuasive than a *per se* rule that joint obligees are always indispensable parties. This is especially so given the repeated instruction to district courts that Rule 19 is flexible and should be given practical application. *See, e.g., Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116 n.12, 88 S. Ct. 733 (1968); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985); *Eldredge*, 662 F.2d at 537.

Defendants also argue that another individual in Austria, a member of the Müller-Hofmann family ("Müller-Hofmann"), has made a claim for the portrait of Amalie Zuckerkandl, and that Müller-Hofmann is therefore a necessary party to this action. However, Müller-Hofmann asserts a claim to only one painting at issue in this action. Each cause of action in this action involves all six paintings. Therefore, having concluded that each cause of action is not subject to dismissal with regard to the remaining five paintings, and mindful that the Court may consider at any time in the proceedings whether the appropriate parties are joined,[26] the Court does not now consider whether Müller-Hofmann is a necessary party.

For these reasons, Plaintiff has not failed to join necessary parties and dismissal pursuant to Rule 19 is inappropriate; therefore, the Court denies Defendants Rule 12(b)(7) Motion to Dismiss for failure to join necessary parties.

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26. *See McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984) (holding that the issue of indispensability of parties may be raised at any time in the proceedings, even *sua sponte* and on appeal).

VII. Venue

The FSIA has its own venue provision. 28 U.S.C. § 1391(f)(1)-(4). In relevant part, that provision states:

> (f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; . . . (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

Id.

Plaintiff argues that venue is proper under § 1391(f)(1) because a substantial part of the events or omissions giving rise to the claim occurred in the Central District because Austria has failed to deliver the paintings to her in Los Angeles. Defendants, however, correctly contend that the events or omissions giving rise to the claim occurred in Austria, where the paintings are located and where decisions determining the status and disposition of the paintings have been made. *See* 17 *Moore's Federal Practice* § 110.04[1] (Matthew Bender 3d ed.). Therefore, venue is not appropriate under § 1391(f)(1).

Plaintiff also contends that venue is proper under § 1391(f)(3) because Austria is doing business in the Central District. Defendants argue that the Gallery is not doing business in the Central District, and, in any event, the Gallery's activities do not establish that the Central District is a proper venue for claims against the Republic.

Unlike the other provisions of the FSIA that use the term "commercial activity," the FSIA's venue provision uses the term "doing business." The statutory scheme of the FSIA suggests that these terms, if not interchangeable, are at least substantially similar in meaning. The Court can find no authority that suggests that a foreign agency or instrumentality that engages in "commercial activity" within a district is not also "doing business" within a district. Therefore, venue is appropriate under § 1391(f)(3) because the Gallery engages in commercial activity in the Central District as explained in section III.F.3., *supra*.[27]

Defendants correctly argue that Plaintiff did not set forth § 1391(f)(3) as a basis for venue in the Complaint. Accordingly, Plaintiff is hereby **GRANTED** fifteen (15) days'

27. Also as explained in section II.F.3., the Gallery's commercial activities establish jurisdiction over the Republic under § 1605(a)(3). When read in conjunction with § 1605(a)(3), it seems clear that venue is proper as to the foreign state under the FSIA "doing business" provision, § 1391(f)(3), if the agency or instrumentality engages in commercial activity within the district. This construction is supported by the FSIA's definition of "foreign state", which includes agencies and instrumentalities within the term, "foreign state." 28 U.S.C. § 1603(b).

leave to amend the Complaint to set forth the basis for venue pursuant to § 1391(f)(3).[28]

VIII. Conclusion

For the reasons stated herein, Defendant's Motion to Dismiss is **DENIED.**

Plaintiff is hereby **GRANTED** fifteen (15) days' leave to amend the Complaint to set forth the basis for venue pursuant to § 1391(f)(3).

The portion of this Order holding that the Court has subject matter jurisdiction because Austria is not entitled to sovereign immunity is immediately appealable pursuant to the collateral order doctrine. *Compania Mexicana de Aviacion, S.A. v. United States*, 859 F.2d 1354 (9th Cir. 1988). For this reason, the Court hereby certifies the remaining portions of this Order for interlocutory appeal pursuant to 28 U.S.C. § 1291.

DATED this 4th day of May 2001.

s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, Judge
United States District Court

28. This 15-day requirement will be stayed pending resolution of the interim appeal.

APPENDIX C — MINUTE ORDER AMENDING ORDER DENYING MOTION TO DISMISS, DATED MAY 4, 2001, OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION, ENTERED MAY 11, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CIVIL MINUTES - GENERAL

Case No. CV 00-8913 FMC(AIJx) Date: May 9, 2001

Title: *MARIA V. ALTMANN v REPUBLIC OF AUSTRIA, et al.*

PRESENT: *THE HONORABLE FLORENCE-MARIE COOPER, JUDGE*

ORDER ON DEFENDANT'S REQUEST FOR CLARIFICATION; ORDER AMENDING MAY 4, 2001 ORDER DENYING MOTION TO DISMISS

On May 8, 2001, Defendants filed a Request for Clarification of the Court's May 4, 2001, Order Denying Defendants' Motion to Dismiss. Defendants correctly note that the Court cited the incorrect statutory provision when it certified the issues of forum nonconveniens, joinder, and venue for interlocutory appeal. Specifically, the Court certified these issues for interlocutory appeal pursuant to 28 U.S.C. 1291; however, the statutory provision that should have been cited is 28 U.S.C. 1292(b). Accordingly, the final section, Section IX, of the Court's May 4, 2001, Order Denying Defendant's Motion to Dismiss is hereby amended to read:

Appendix C

IX. Conclusion

For the reasons stated herein, Defendant's Motion to Dismiss is DENIED.

Plaintiff is hereby GRANTED fifteen (15) days' leave to amend the Complaint to set forth the basis for venue pursuant to 1391(f)(3).

The portion of this Order holding that the Court has subject matter jurisdiction because Austria is not entitled to sovereign immunity is immediately appealable pursuant to the collateral order doctrine. *Compania Mexicana de Aviacion, S.A. v. United States*, 859 F.2d 1354 (9th Cir. 1988). For this reason, the Court hereby certifies the remaining portions of this Order for interlocutory appeal pursuant to 28 U.S.C. 1292(b).

MINUTES FORM 11 Initials of Deputy Clerk AW
CIVIL - GEN

APPENDIX D — ORDER AMENDING OPINION, DATED DECEMBER 12, 2002, OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND DENYING PETITION FOR REHEARING FILED APRIL 28, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 01-56003, 01-56398

D.C. No. CV-00-08913-FMC
Central District of California, Los Angeles

MARIA V. ALTMANN, an individual,

Plaintiff - Appellee,

v.

REPUBLIC OF AUSTRIA, a foreign state; and the AUSTRIAN GALLERY, an agency of the Republic of Austria,

Defendants - Appellants.

ORDER AMENDING OPINION AND DENIAL OF REHEARING

Before: WARDLAW, W. FLETCHER, Circuit Judges, and WHYTE, District Judge.

The Opinion filed December 12, 2002, slip op. 1, and appearing at 317 F.3d 954 (9th Cir. 2002), is amended as follows:

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1. At slip opinion 16; 317 F.3d at 964, insert the following sentence after the citation to *Verlinden B.V. v. Central Bank of Nigeria* and before the sentence beginning "In 1943, the Supreme Court pronounced . . .":

> This explanation made no distinction between *in rem* and *in personam* actions.

2. At slip opinion 16; 317 F.3d at 965, insert the word "alleged" in the sentence beginning "Determining whether the FSIA . . ." so that the sentence reads in full: "Determining whether the FSIA may properly be applied thus turns on the question whether Austria could legitimately expect to receive immunity from the executive branch of the United States for its alleged complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings."

3. At slip opinion 17; 317 F.3d at 965, insert the word "allegedly" in the sentence beginning "That Austria and the United States . . ." so that the sentence reads in full: "That Austria and the United States were no longer on opposite sides of World War II at the time the Federal Monument Agency allegedly attempted to extort valid title to the Klimt paintings does not mean that Austria could reasonably expect the granting of immunity for an act so closely associated with the atrocities of the War."

4. At slip opinion 18, 317 F.3d at 966, insert the following language after the citation to the Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 (S.D.N.Y.) and before the sentence beginning "We conclude, as did Judge Wald, . . .":

Appendix D

This letter strongly indicates that the State Department would not have recommended immunity as a matter of grace and comity for Austria's expropriation of the Klimt paintings. Indeed, in January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, warning that

> they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.
>
> Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons . . . resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

Dep't St. Bull., Jan. 1943, at 21-22.

Appendix D

With these amendments, the panel has voted unanimously to deny the petition for panel rehearing. Judges Wardlaw and Fletcher have voted to deny the petition for rehearing en banc, and Judge Whyte has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing will be entertained.

APPENDIX E — STATUTES INVOLVED

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 85—DISTRICT COURTS; JURISDICTION

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Current through P.L. 108-35, approved 06-23-03

28 U.S.C.A. § 1330(a)-(c)

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

Appendix E

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 87—DISTRICT COURTS; VENUE

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Current through P.L. 108-35, approved 06-23-03

28 U.S.C.A. § 1391(f)(1)-(4)

§ 1391. Venue generally

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV—JURISDICTION AND VENUE
CHAPTER 97—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

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Current through P.L. 108-35, approved 06-23-03

28 U.S.C.A. § 1603(a)-(e)

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

APPENDIX F — BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED JANUARY 13, 2003

No. 01-56003; 01-56398

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA V. ALTMANN, an individual,

Plaintiff-Appellee

v.

REPUBLIC OF AUSTRIA, a foreign state; and the AUSTRIAN GALLERY, an agency of the Republic of Austria,

Defendants-Appellants.

On Appeal from an Order of the United States District Court for the Central District of California

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appendix F

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Appendix F

INTRODUCTION AND SUMMARY

The panel's decision in this case held that Austria is subject to suit in American courts for claims arising in Europe out of Nazi-era expropriations more than half a century ago. In so holding, the panel has created an exception to the general rule of foreign sovereign immunity never before recognized in our law. The panel reached this conclusion based upon an erroneous assessment of the principles of law that obtained in the first half of the last century, of the contemporaneous policy of the Executive Branch, and of the proper manner for analyzing retroactivity under the Foreign Sovereign Immunities Act.

The panel's belief that, without specific direction from the Executive Branch, American courts could historically exercise *in personam* jurisdiction over the foreign acts of unfriendly governments is without precedent. The language the panel cites in support of this conclusion derives from *in rem* cases, rather than *in personam* suits such as plaintiff's. Such an extension, without authorization under the FSIA or specific direction from the Executive, interjects the courts into matters of foreign policy in precisely the ways that the doctrine of immunity is intended to prevent. Nor, contrary to the panel's conclusion, had the Executive Branch made a determination to strip Austria of its immunity for suits arising out of Nazi atrocities. The panel's reliance on the so-called *Bernstein* Letter as evidence of such an exception is mistaken because that letter concerned the act of state doctrine, not the doctrine of foreign sovereign immunity. While undeniably horrific, Nazi-era expropriations would have been immune from suit in the United States when they occurred. Therefore,

the panel's exercise of jurisdiction pursuant to the expropriation exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) – an exception to immunity not recognized until some thirty years later – is impermissibly retroactive.

ARGUMENT

BECAUSE AUSTRIA WOULD HAVE BEEN IMMUNE FROM SUIT ON PLAINTIFF'S CLAIMS AT THE TIME THEY AROSE, THE FSIA'S EXPROPRIATION EXCEPTION DOES NOT RETROACTIVELY PROVIDE A BASIS FOR JURISDICTION.

A. The Foreign Sovereign Immunities Act ("FSIA") sets forth a general rule that foreign states are immune from suit in American courts. 28. U.S.C. § 1604. Courts may exercise jurisdiction over foreign states *only* if the suit comes within one of the specific exceptions to that rule established by Congress. *See ibid.* The expropriation exception, the only exception discussed by the panel, was not recognized at the time plaintiff's claims arose, and may not, therefore, be applied retroactively.

It is well-established that changes in the law that affect substantive rights do not, absent a clear congressional indication to the contrary, apply retroactively. *See INS v. St. Cyr*, 533 U.S. 289, 316 (2001). This presumption against retroactivity applies also to "jurisdictional" statutes that affect substantive rights. *See Hughes-Aircraft Co. v. United States,* 520 U.S. 939, 951 (1997). Where a new jurisdictional statute "eliminates a defense to * * * suit," the change affects

"the substance" of the parties' rights and will not apply to conduct that predates the change, unless Congress explicitly provides to the contrary. *Id.* at 948.

The defense of foreign sovereign immunity, currently embodied in the FSIA, is a matter of "*substantive* federal law." *See Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 493 (1983) (emphasis added). Thus, as the Second and Eleventh Circuits have previously held, if a particular exception to the FSIA's general rule of immunity was not yet recognized at the time of the challenged conduct, that exception cannot apply retroactively. *See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics,* 841 F.2d 26, 27 (2d Cir. 1988) (application of FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), to conduct pre-dating the adoption of that exception by the Executive in 1952 would be impermissibly retroactive); *Jackson v. People's Republic of China,* 794 F.2d 1490, 1497-98 (11th Cir. 1986) (same).

The definitive discussion of the United States' policy regarding foreign sovereigns' susceptibility to suit in the United States at the time plaintiff's claims arose is contained in the "Tate Letter" of May 19, 1952 from Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip B. Perlman. *See Alfred Dunhill of London, Inc. v. Cuba,* 425 U.S. 682, 711 (1976) (reprinting Tate Letter). The Tate Letter explains that from the time of *The Schooner Exchange v. McFadden,* 11 U.S. (7 Cranch) 116 (1812), until 1952, the United States adhered to the "absolute theory of sovereign immunity." *Alfred Dunhill,* 425 U.S. at 711 (reprinting Tate Letter). Under this doctrine, as understood by the Department

charged with its application: "*a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign.*" *Ibid.* (emphasis added).

As the Tate Letter makes clear, the United States did not recognize an expropriation exception to sovereign immunity prior to 1952. Nor, indeed, was it recognized under the "restrictive" theory that the Tate Letter adopted. *See Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 360 (2d Cir. 1964) (under restrictive theory, foreign sovereigns continued to enjoy immunity with respect to suits challenging "strictly political or public acts about which sovereigns have traditionally been quite sensitive," including "internal administrative acts" and "legislative acts, *such as nationalization*" (emphasis added)). Rather, the expropriation exception was first recognized in American law as part of the FSIA. Because the expropriation exception was not recognized at the time plaintiff's claims arose, it cannot serve as the basis for jurisdiction in this suit.

The panel's opinion does not hold that the FSIA's expropriation exception applies retroactively to pre-1952 conduct generally, but only to Austria and, presumably, other countries allied with or occupied by Germany during World War II. There is no indication, however, that when Congress enacted the FSIA, and gave to the courts the responsibility to decide issues of immunity, Congress intended the courts to interject themselves into the arena of foreign policy by deciding, on a case-by-case basis, to deny a generally-available immunity to particular countries on the basis of their heinous conduct the status of their relations with the United States. In fact, this Court and several others have specifically

rejected such a role for the courts. *See Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 718-19 (9th Cir. 1992); *Smith v. Socialist People's Libyan Arab Jamahiriya,* 101 F.3d 239, 244 (2d Cir. 1997); *Princz v. Federal Republic of Germany,* 26 F.3d 1166, 1174-1175, n.l. (D.C. Cir. 1994). Such an approach is, moreover, contrary to one of Congress's chief purposes in adopting the FSIA: to ensure a more uniform application of sovereign immunity principles. *See* H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606.

The above-quoted language from the Tate Letter clearly demonstrates that under the practice and policy established for the courts Austria *would* have been entitled to immunity from suit on claims such as this. The panel erred in failing to address and give effect to this contemporaneous statement by the Executive Branch of its practice regarding foreign sovereign immunity. The panel's contrary conclusion rests upon a misunderstanding of foreign sovereign immunity policy and practice during the pre-1952 period.

B. The panel's opinion relies upon the mistaken belief that, during the pre-1952 period, the courts were free to exercise *in personam* jurisdiction over foreign sovereign with respect to actions in its own territory if the United States did not have "friendly" relations with the sovereign at the time of the challenged conduct. The panel derived this view from the Supreme Court's statement in *Verlinden* that, prior to 1952, immunity was accorded "in all actions against *friendly* foreign sovereigns." *Altmann v. Republic of Austria,* 2002 WL 31770999, *7 (9th Cir. Dec. 12, 2002) *quoting Verlinden,* 461 U.S. at 486

(emphasis added by *Altmann*).[1] *Verlinden*'s use of the word "friendly" does not support the weight the panel placed upon it.

To begin, even if there were an exception for "unfriendly" nations, it is not clear that the exception would properly apply to Austria. The United States was not at war with the State of Austria. To the contrary, the United States took the view that Austria was the first country to be occupied by Nazi Germany. *See* Declaration on Austria at Moscow, *quoted in* Sen. Exec. Rpt. No. G, 84th Cong., 1st Sess. at 3 (June 15, 1955). Such subtle distinctions in our nation's foreign relations highlight the problem with courts undertaking the kinds of assessments called for under the panel's decision. The panel's approach requires courts to establish their own definition of "friendly," to assess historical relationships of the United States under this definition, and to decide how to weigh changes in relations during the period when suit might have been brought. The responsibility for drawing such lines among foreign governments and determining when to strip them of immunity can only properly be exercised by the political branches.

Moreover, as a matter of law, *Verlinden*'s reference to "friendly foreign sovereigns" does not support the proposition that our courts would have reached out to exercise *in personam* jurisdiction over foreign sovereigns for sovereign acts taken within their borders simply because the

1. The panel extended this perceived exception as well to acts committed while friendly relations admittedly existed if the act was "closely associated with the atrocities of the War." *Altmann,* 2002 WL 31770999, at *7.

United States was not on "friendly" terms with that government during the period of the challenged conduct. The history of the phrase "friendly foreign sovereigns" is instructive. *Verlinden* borrowed the phrase from the Court's decisions in *Ex Parte Peru,* 318 U.S. 578, 588-89 (1943), and *Mexico v. Hoffman,* 324 U.S. 30, 34 (1945). *See Verlinden,* 461 U.S. at 486 (citing the same). These cases were *in rem* proceedings against foreign-owned ships, and, in turn, borrowed the "friendly" foreign government terminology from prior *in rem* cases, including the leading case, *The Schooner Exchange. See Ex Parte Peru,* 318 U.S. at 588; *Hoffman,* 324 U.S. at 34. In *The Schooner Exchange,* the Court started with the general principle that "the person of the sovereign [is immune] from arrest or detention within a foreign territory" if he enters "with the knowledge and license of its sovereign." 11 U.S. (7 Cranch) at 137. The Court then went on to discuss in what circumstances this immunity extended to a foreign sovereign's warship that had entered an American harbor. The Court observed that "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace," *id.* at 141, and held, therefore, that immunity also extends to "national ships of war, entering the port of a friendly power open for their reception." *Id.* at 145-46.

This implicit indication that the United States would not refrain from seizing a belligerent nation's warships if they enter its ports during a war says nothing about whether, in the absence of specific direction from the Executive Branch, U.S. courts could exercise *in personam* jurisdiction over a non-consenting, unfriendly government with respect to acts committed within its own territory, including after normal

relations are resumed. *See Wulfsohn v. Russian Socialist Federated Soviet Republic,* 234 N.Y. 372, 373-74 (N.Y. 1923) (distinguishing between proceedings respecting "title to property situated within the jurisdiction of our courts" and suits where "[t]he government itself is sued for an exercise of sovereignty within its own historical evidence. The panel's opinion rests largely on a second letter by Mr. Tate, the so-called "Bernstein Letter," submitted to the Second Circuit in *Bernstein v. N.V. Nederlandshe-Amerikaansche,* 210 F.2d 375, 376 (2d Cir. 1954) ("*Bernstein II*"). The *Bernstein* Letter stated that the State Department's policy was "to relieve American courts of any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." April 13, 1949 letter of Jack B. Tate, *reprinted in Bernstein II,* 210 F.2d at 376. The *Bernstein* Letter did not, however, address the doctrine of foreign sovereign immunity. Rather it concerned the act of state doctrine, *i.e.,* a court's ability to pass on the validity of a foreign government's acts in a case that is properly within its jurisdiction.

In *Bernstein,* the plaintiff sued to recover commercial property that the Nazis had confiscated from him without compensation. *See-Bernstein v. N.V. Nederlandshe-Ametikaansche,* 173 F.2d 71, 72 (2d Cir. 1949) ("*Bernstein I*"). Significantly, however, the defendant in *Bernstein* was not a foreign government, but a Dutch corporation. *Ibid.* The Second Circuit had initially applied the act of state doctrine, pursuant to which it refused to "pass on the validity of acts of officials of the German government." *Bernstein II,* 210 F.2d at 375. The *Bernstein* Letter addressed solely that issue. The *Bernstein* Letter does not speak to the susceptibility of

the German government to suit in our courts, but instead concerns only the courts' "jurisdiction to *pass upon the validity of the acts of Nazi officials.*" *Bernstein II,* 210 F.2d at 376 (reprinting letter) (emphasis supplied). *See also* Nov. 26, 1975 Letter of Legal Adviser Monroe Leigh to the Solicitor General (characterizing *Bernstein* Letter as "advis[ing] that the *act of state doctrine* need not apply to a class of cases involving Nazi confiscations" (emphasis added)), *reprinted in Alfred Dunhill,* 425 U.S. at 706, 708.

The Supreme Court has recognized that "[t]he act of state doctrine, . . . although it shares with the immunity doctrine a respect for foreign states," is distinct from it. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 438 (1964) (applying act of state doctrine, though foreign government instrumentality had waived immunity by invoking the court's jurisdiction). The significance of this distinction was recognized at the time of the *Bernstein* and Tate letters by the Second Circuit. In *Zwack v. Kraus Bros.,* 237 F.2d 255 (2d Cir. 1956), plaintiff sued to stop an American company from using a trade name that the Hungarian government had expropriated. The defendant sought to have the suit dismissed both on act of state grounds and for plaintiff's failure to join Hungary as an indispensable party. With respect to the act of state doctrine, the Second Circuit declined to recognize the validity of Hungary's uncompensated expropriation, citing the United States' policy declared in *Bernstein II. See id.* at 260-61. At the same time, however, the Second Circuit recognized that the Hungarian government itself was "not subject to the jurisdiction of the court below unless its should voluntarily appear." *Id.* at 259.

Here, in contrast, the panel's decision confuses these distinct concepts. The panel's extension of the *Bernstein* Letter policy from the act of state context to the field of sovereign immunity is especially untenable in light of the author's own implicit rejection of such an interpretation. The *Bernstein* Letter was authored by the same person who wrote the Tate Letter only three years later. The panel's reading creates a conflict between the two letters that did not exist and has never been thought to exist.

Contemporaneous conduct concerning the redress of Nazi-era wrongs further supports the conclusion that foreign governments, including Austria, were recognized to be absolutely immune from private litigation in U.S. courts on claims arising out of the Holocaust. The United States committed considerable energy to obtaining the return of property and some measure of compensation for the victims of the Holocaust both during the occupation and thereafter. In post-war treaties with both Germany and Austria, the United States obtained promises on the part of those governments to provide for the return of confiscated property, and in some cases the United States negotiated agreement for the payment of certain claims. *See, e.g.*, State Treaty for the Re-establishment of an Independent and Democratic Austria, 6 U.S.T. 2269, Art. 26 (May 15, 1955) (providing for return by Austria of all property confiscated on account of the racial origin or religion of the owner); Dept. of State Bulletin, July 9, 1956 at 66 (announcing procedures adopted under Austrian law for compensation of persecutees who had fled Austria); Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, 10 U.S.T. 1158 (May 22, 1959) (establishing administrative settlement fund for certain

property claims); Convention on the Settlement of Matters Arising out of the War and the Occupation, as amended, 6 U.S.T. 4411 (October 23, 1954) (Germany).

The common theme of these arrangements is that they envision restitution or compensation under schemes adopted as part of domestic German or Austrian law or through diplomatic arrangements. In none of these agreements is there any statement that private parties could sue the governments of Germany or Austria in foreign courts as an alternative means of redress. *Cf. Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428, 442 (1989) (holding that even a treaty "stat[ing] that compensation shall be paid for certain wrongs" by foreign government does not imply an abrogation of immunity from private suit). Likewise, it does not appear that prior to 1992, any plaintiff even *attempted* to sue Germany or Austria in American courts for Nazi-era atrocities. And, significantly, prior to this litigation, the two courts of appeals to consider such suits dismissed them for lack of jurisdiction. *See Princz*, 26 F.3d at 1176; *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001). The absence of any reference to private litigation in American courts against the German or Austrian governments in the United States' extensive diplomatic efforts to obtain compensation for the victims of Nazism and the similar absence of any attempt by a private party to sue Austria or Germany for Nazi-era atrocities during the period immediately following the war evidence a common understanding during the contemporaneous period that these governments were immune from such suit in the courts of the United States.

D. The various "additional reasons" that the opinion gives in support of its conclusion are also flawed and not relevant to determining whether an FSIA exception should apply retroactively. For example, it is irrelevant to the sovereign immunity inquiry that, as the panel observes, certain of the individuals responsible for Nazi atrocities were prosecuted criminally at Nuremberg. *See Altmann,* 2002 WL 31770999, at *9. The fact that individual Nazi officials could be criminally prosecuted in an international tribunal does not in any way suggest that the Austrian government was subject to suit by private plaintiffs in American courts. Indeed, individual officials are frequently subject to suit in circumstances where the sovereign retains its immunity. *See, e.g., Alden v. Maine,* 527 U.S. 706, 757 (1999). Neither the Executive nor the Congress has ever established a "war-crimes" exception to state immunity. *See Siderman de Blake,* 965 F.2d at 718-19.

Nor is it relevant that Austria adopted the restrictive theory of immunity in the 1920s. *Cf. Altmann,* 2002 WL 31770999, at *8. The panel does not cite any instance in which a foreign sovereign was denied immunity because it applied the restrictive theory of immunity in its own courts, and we are aware of none. Indeed, although, according to the Tate Letter, Peru was one of the countries that had previously accepted the restrictive theory of immunity, *see Alfred Dunhill,* 425 U.S. at 713, the United States certified, in 1942, the immunity of a Peruvian commercial vessel, *see Ex Parte Peru,* 318 U.S. at 579-81. The panel's analysis makes a foreign government's susceptibility to suit turn on "the defendant country's acceptance of the restrictive principle of sovereign immunity." *Altmann,* 2002

WL 31770999, at *9 (indicating that Russia, China, and Mexico, which had not accepted the restrictive theory, would be immune from suit for conduct during the pre-1952 era). But, as we previously noted, one of Congress's purposes in adopting the FSIA was to ensure a more uniform application of sovereign immunity principles. *See* H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606. It would not have wanted application of the FSIA to vary among countries, especially since the Executive Branch had never previously established such a rule.

Even if such distinctions were appropriate, Austria's adoption of the restrictive theory in the 1920's would still be inapposite to assessing Austria's immunity with respect to plaintiff's claim because, as noted above, the restrictive theory did not permit jurisdiction over a foreign government's sovereign or public acts, such as expropriation of property within its territory. *See Verlinden,* 461 U.S. at 486-87; *Victory Transport,* 336 F.2d at 360 (under restrictive theory foreign sovereigns retained immunity with respect to suits challenging "internal Administrative acts" and "legislative acts, *such as nationalization*" (emphasis added)). *See also Saudi Arabia v. Nelson,* 507 U.S. at 361 (citing same with approval).

Finally, the panel asserts that, even if Austria had an expectation of immunity from suit for discriminatory expropriations, such an expectation "would be due no deference," *Altmann,* 2002 WL 31770999, at *10. This assertion is contrary to the Supreme Court's holding in *Hughes.* In *Hughes,* there was no question that the defendant's alleged fraud against the United States was wrongful at the time it was committed, and that the conduct was even subject

to suit by the federal government. 520 U.S. at 948. Nonetheless, the Court held that the presumption against retroactivity applied to a statute that allowed a new plaintiff, a private person, to bring the suit on behalf of the United States. *Id.* at 951. Thus, there is no basis for the panel's assertion that the presumption against retroactivity applies only to fields of law such as "contracts . . . in which courts have traditionally deferred to the "settled expectations' of the parties." *Altmann*, 2002 WL 31770999, at *10.

CONCLUSION

For the foregoing reasons, the petition for rehearing and suggestion for rehearing en banc should be granted.[2]

Respectfully submitted,

Of counsel:
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Deputy Legal Advisor

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Attorney Adviser

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2. Because of space constraints, the United States has limited its arguments in this brief to the question of the Executive Branch's sovereign immunity practice prior to 1952, an issue as to which the government has a unique ability to speak. If the Court does grant rehearing, and calls for a new round of briefing, the United States reserves its right to address as well the other points raised in Austria's petition.

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January 13, 2003

Appendix F

STATUTORY ADDENDUM

28 U.S.C. § 1605(a) (3).

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

* * * * *

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

APPENDIX G — EXCERPTS OF HOUSE REPORT 94-1487 CONCERNING THE FOREIGN SOVEREIGN IMMUNITIES ACT[1]

JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES

SEPTEMBER 9, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

MR. FLOWERS, from the Committee on the Judiciary, submitted the following

REPORT

[Including cost estimate of the Congressional Budget Office]
[To accompany H.R. 11315]

The Committee on the Judiciary, to whom was referred the bill (H.R. 11315) to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

* * *[2]

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1. The Senate Report on the FSIA, Senate Report 94-1310, contains the identical text of these excerpts.

2. Denotes omitted text.

Appendix G

BACKGROUND

Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs from diplomatic immunity (which is drawn into issue when an individual diplomat is sued). H.R. 11315 deals solely with sovereign immunity.

Sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange v. M'Faddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943) and *Mexico v. Hoffman*, 324 U.S. 30 (1945).

Partly in response to these decisions and partly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its "Tate Letter" of 1952. 26 Department of State Bulletin 984. Thus, under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state's public acts, but not in cases based on commercial or private acts. The Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the Department

Appendix G

applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

* * *

SECTION-BY-SECTION ANALYSIS

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch. (See *Ex Parte Peru*, 318 U.S. 578, 588-589 (1943).)

The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity, or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

* * *

Appendix G

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agencies, and instrumentalities. Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however, will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill.

(a) *Subject Matter Jurisdiction.*—Section 1330(a) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605-1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

Appendix G

In addition, the jurisdiction of district courts in cases against foreign states is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts. Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties, but only where the amount in controversy exceeds $10,000. 28 U.S.C. 1332(a)(2) and (3). (See analysis of sec. 3 of the bill, below.)

A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question of jurisdiction, could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity.

(b) *Personal Jurisdiction.*—Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91-358, sec. 132(a), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly,

each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605-1607 are all carefully interconnected.

(c) *Effect of an Appearance.*—Section 1330(c) states that a mere appearance by a foreign state in an action does not confer personal jurisdiction with respect to claims which could not be brought as an independent action under this bill. The purpose is to make it clear that a foreign state does not subject itself to claims unrelated to the action solely by virtue of an appearance before a U.S. court. While the plaintiff is free to amend his complaint, he is not permitted to add claims for relief not based on transactions or occurrences listed in the bill. The term "transaction or occurrence" includes each basis set forth in sections 1605-1607 for not granting immunity, including waivers.

* * *

SEC. 4. NEW CHAPTER 97:
SOVEREIGN IMMUNITY PROVISIONS

Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states and their political subdivisions, agencies, and instrumentalities. The specific sections of chapter 97 are as follows:

* * *

Section 1605. General exceptions to the jurisdictional immunity of foreign states

Section 1605 sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in section 1603(a), would not be recognized in a Federal or State court in the United States.

* * *

(a)(3) *Expropriation claims.*—Section 1605(a)(3) would, in two categories of cases, deny immunity where "rights in property taken in violation of international law are in issue." The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged

for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality.

The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable. See 22 U.S.C. 2370(e)(2).

* * *

SEC. 5. VENUE

This section amends 28 U.S.C. § 1391, which deals with venue generally. Under the new subsection (f), there are four express provisions for venue in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities.

(1) The action may be brought in the judicial district wherein a substantial part of the events or omissions giving rise to the claim occurred. This provision is analogous to 28 U.S.C. § 1391(e), which allows an action against the United States to be brought, *inter alia*, in any judicial district

in which "the cause of action arose." The test adopted, however, is the newer test recommended by the American Law Institute and incorporated in S. 1876, 92d Congress, 1st session, which does not imply that there is only one such district applicable in each case. In cases under section 1605(a)(2), involving a commercial activity abroad that causes a direct effect in the United States, venue would exist wherever the direct effect generated "a substantial part of the events" giving rise to the claim.

In cases where property or rights in property are involved, the action may be brought in the judicial district in which "a substantial part of the property that is the subject of the action is situated." No hardship will be caused to the foreign state if it is subject to suit where it has chosen to place the property that gives rise to the dispute.

(2) If the action is a suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, and if the action is brought under the new section 1605(b) in this bill, the action may be brought in the judicial district in which the vessel or cargo is situated at the time notice is delivered pursuant to section 1605(b)(1).

(3) If the action is brought against an agency or instrumentality of a foreign state, as defined in the new section 1603(b) in the bill, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. This provision is based on 28 U.S.C. § 1391(c).

(4) If the action is brought against a foreign state or political subdivision, it may be brought in the U.S. District Court for the District of Columbia. It is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend. New subsection (f) would, of course, not apply to entities that are owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332(c) and (d). For purposes of this bill, such entities are not agencies or instrumentalities of a foreign state. (See the analysis to sec. 1603(b).)

As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state, such as by failing to object to improper venue in a timely manner. (See rule 12(h), F.R. Civ. P.)

* * *

SEC. 8. EFFECTIVE DATE

This section establishes that the effective date of the act shall be 90 days after it becomes law. A 90-day period is deemed necessary in order to give adequate notice of the act and its detailed provisions to all foreign states.

EDITOR'S NOTE

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Supreme Court, U.S.
FILED

03 . 13 JUN 27 2003

OFFICE OF THE CLERK

No. 03-

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX

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Appendix To The Opinion Of The United States
Court Of Appeals For The Ninth Circuit
Dated And Decided December 12, 2002

EXHIBIT A

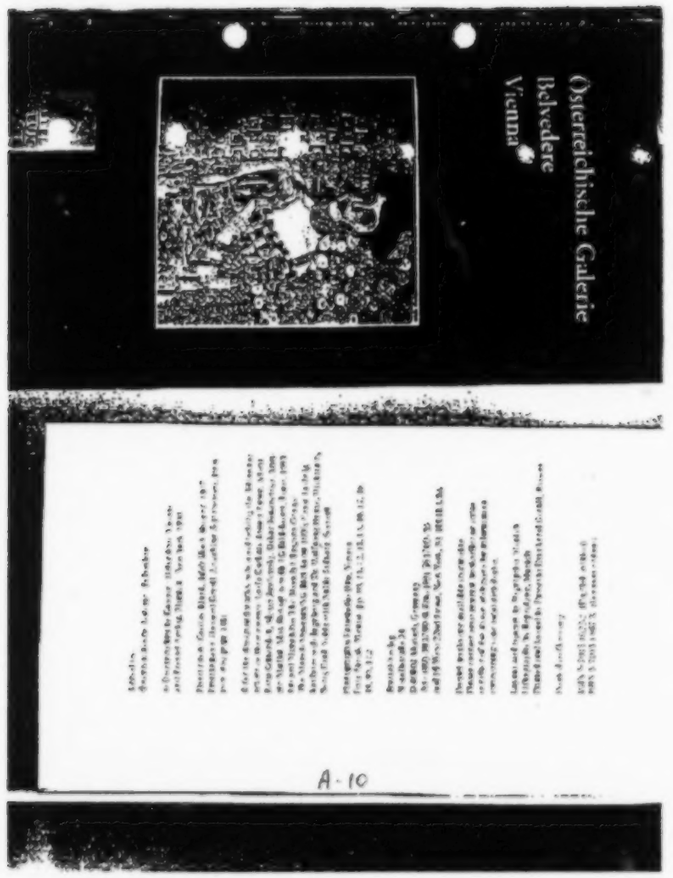


EXHIBIT B

GERBERT FRODL

GUSTAV KLIMT

in the

AUSTRIAN GALLERY BELVEDERE

in Vienna

VERLAG GALERIE WELZ · SALZBURG

B- 11

ADELE BLOCH BAUER I. 1907

Oil, silvering and gilding on canvas, 1[illegible] x 1[illegible] cm

Signed and dated bottom right: GUSTAV KLIMT [illegible]

Inventory No. 3833

Acquired through a bequest (1936) of the Bloch Bauer [illegible], Vienna

Nemeny Decker, No. 192

Cf. Strobl I, Nos. 3284–3311 and IV, Nos. 4[illegible]

Last exhibition unofficially in the Wiener Werkstätte [illegible] and a temporary loan to the International Art Exhibition, Manchester, No. 417.

This portrait of Adele Bloch Bauer (1881–1925), wife of the Viennese industrialist Ferdinand Bloch, is the most important work of the so-called "golden style" span, from "Pallas Athene" to "Danaë". Its [illegible] is often somewhat misleading when it is quite consciously Klimt's answer to the impression of the Viennese Secession made [illegible] Ludwig Hevesi, friend and promoter of the Secession, called the picture an "idol or a golden reliquary holder", correctly drawing attention to an affinity with the Byzantine mosaics in Ravenna, and in particular the 6th century figure of the Empress Theodora in San Vitale. This representative portrait evidently held a special significance for Klimt himself, since he did more than 100 preparatory studies for it over a period of several years. He would seem to have conceived it as a universally valid celebration of a beautiful woman, and thus of the female sex in general, which was to be depicted with all the [illegible] belonging an empress. Form and content, down to the endeavors of colors, and [illegible] the influence of historical [illegible], are here partially summoned in a way that distinguishes Viennese Jugendstil from the related art and decorative [illegible] of other European cities. Of course there is a danger that the preponderance of ornamentation and [illegible] might reduce [illegible] to [illegible], the subject matter, however, is [illegible]

Adele Bloch Bauer in her drawing room

R- 12

B - 13

ADELE BLOCH-BAUER II. 1912
Oil on canvas, 190 x 120 cm
Signed bottom right: GUSTAV KLIMT
Inventory No. 6810
Acquired through a bequest [1938] of Ferdinand Bloch-Bauer.
Formerly in the Bloch-Bauer Collection, Vienna

Nirenstein/Dobbal. No. 177
Ch. Strobl T. Nrs. 2076-2712
Exhibition: XI. Internationale Kunstausstellung, Munich 1913, No. 1169

After the high points of his golden style had been reached with the portrait of "Adele Bloch-Bauer I" and "The Kiss" [see p. 33], Klimt abandoned the use of gold in his work. In its place came a stronger use of colour, which was henceforth to characterise all his painting. The decisive factor behind this change cannot be discovered from any statements by Klimt himself (who very seldom commented on his art), but can be inferred from contemporary tendencies in painting, where colour came to prevail over form (Fauvism in France, Expressionism in Germany). The contrast between the first golden portrait of Adele Bloch-Bauer and this work, painted five years later, is very great. A marked change in approach is apparent in the composition (from view on Klimt's favoured standing models over the narrow but still sitting pose), and in the quite different sort of colouring, also in the contrast, spatially the impression created by the richness and pose of the subject. The latter's "intense dalrymple and soul-penetrating, sagacious" [Dominy] suggests the influence of two painters of the younger generation, Egon Schiele and Oskar Kokoschka; the uncompromising precision of human nature in their art had so impressed Klimt that he provided both of them with their first opportunity to exhibit before a wider public.

B - 14

B - 15

PORTRAIT OF AMALIE ZUCKERKANDL, 1917/1918
Unfinished
Oil on canvas, 148 x 120 cm
Unsigned
Inventory No. 7702
Acquired in 1986 from Viennese private ownership
Formerly in the Zuckerkandl collection, Vienna, the Bondi-Bauer collection, Vienna, and the Dr. Otto Hofmann collection, Vienna

Novotny/Dobai, Nr. 213
Cf. Strobl III, Nrs. 2968-2495
First exhibition: Gustav Klimt Memorial Exhibition, Secession, Vienna, June-July 1928, Nr. 56

Amalie Zuckerkandl (1869-1944) was the wife of the Viennese medical professor, Otto Zuckerkandl, who in turn was the brother-in-law of the journalist, writer and admirer of Klimt's work, Berta Zuckerkandl. In 1914 Klimt had already done a series of pencil studies for Amalie's portrait. Her long absence from Vienna caused the work to be interrupted and it could only be continued in 1917. The portrait shows her sitting the pose is uncompromisingly frontal, all illusion of space being absent, (this basic feature remaining even in the finished painting). In Klimt's late work the choice of a square format for a portrait is unusual.

63
B - 16

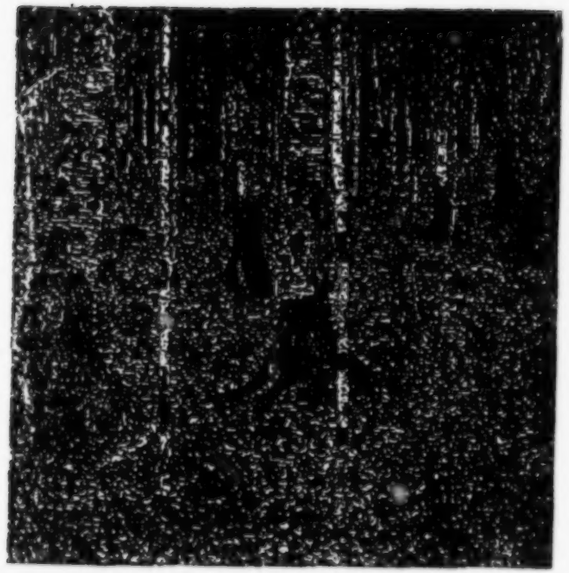
B-17

BEECHWOOD (Buchenwald), 1902
Oil on canvas, 110 x 110 cm
Signed bottom left: GUSTAV KLIMT
Inventory Nr. 4283
Acquired through a bequest (1968) of the Bloch-Bauer family

Novotny-Dobai, Nr. 136
First exhibition: Secession XVIII, 1903 (Nr. 3 or Nr. 4 - both were entitled "Buchenwald")

It is hard to decide whether this picture should be called "Beechwood" (Novotny/Dobai) or "Beechwood" (the latter because manifestly more beeches than firetrees are depicted); but in any case the decision has little importance beyond epistemological conventions. Klimt painted the interior of a wood several times, on each occasion slightly changing the angle of vision. In the other version of the present picture, painted also in 1902, a patch of bright sky is discernible beyond the tree trunks. As early as 1901 he had painted a "fir forest". In all these pictures the predominant colouring is not so much green as the brown and grey tones of the dried leaves or the fresh flaxen red of the bark. Although such works are scarcely comparable to Claude Monet's harmonies of natural depictions (for example of his stacks), Klimt's few woodland pictures nevertheless exhibit more of the ideas and impact of impressionism than do his later paintings of gardens and meadows.

B-18



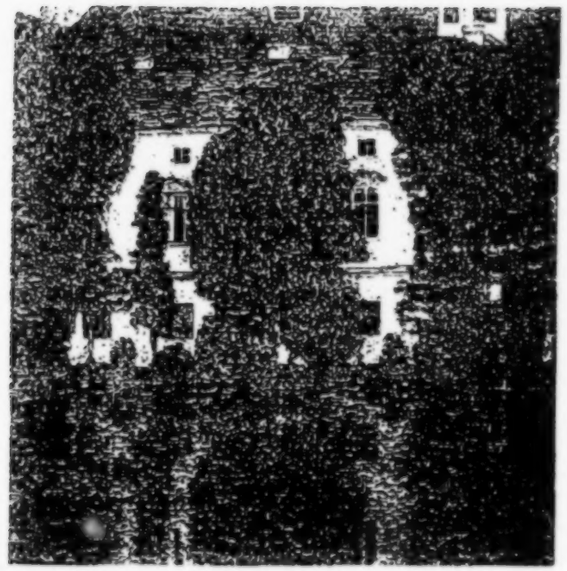
B-19

SCHLOSS KAMMER AM ATTERSEE (Waterside Mansion) III. 1910
Oil on canvas. 110 x 110 cm
Signed on the rear, right-hand side: GUSTAV KLIMT
Inventory Nr. 4318
Acquired through a bequest (1941) of the Bloch Bauer family

Novotny/Dobai, No. 171
First exhibition: Galerie H. O. Miethke, Vienna, October/November 1910

The picture shows the lakeside facade of Schloss Kammer am Attersee near Seewalchen, a 17th century mansion altered and enlarged in the 18th century. In the summer months of the years 1908 to 1912 Klimt lived with the Flöge family in the Villa Oleander in Kammer, near Kammer. It has hitherto been assumed that the picture was painted from a boat, but this cannot be sustained with certainty. Between 1908 and 1912 Klimt did three other views of Schloss Kammer (which still exists in unaltered form) – *Schloss Kammer am Attersee I* (Prague, National Gallery), *II* and *IV* (Private ownership, USA and Vienna). The main facade of the Schloss was surveyed by the painter in his remarkable "Allee" (see p. 87).

B-20



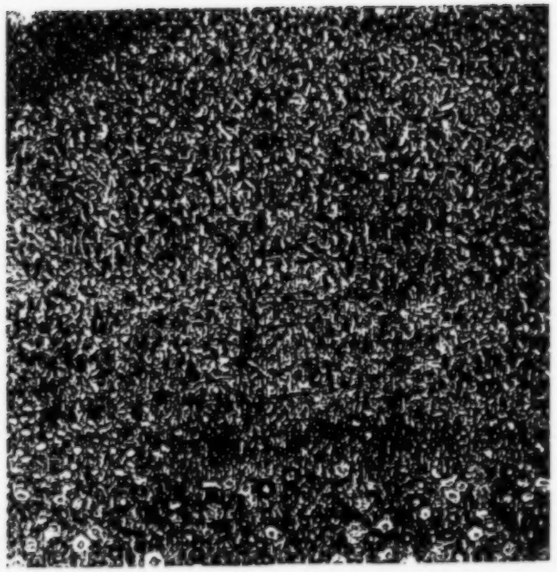
B-21

APPLE TREE I 1911 or 1912
Oil on canvas, 109 x 110 cm
Signed bottom right: GUSTAV KLIMT
Inventory No. 3341
Acquired through a bequest (1936) of Adele Bloch-Bauer
Formerly in the Bloch-Bauer collection, Vienna

Novotny-Dobai, Nr. 182
First exhibition: Graz Art Exhibition, Dresden 1912, Nr. 1032

Trees, and frequently just a lone tree, are a favourite subject of Klimt, their richly suggestive form evidently holding a seductive fascination for him. When the painting is of a single tree, the latter is not so much a particular, observation-drawing feature, but rather the painter's compositional point of reference, the exposure of nuanced colour. These nuances are achieved by the juxtaposition of differently tinted brushstrokes, the latter supplying individual illumination of green, blue or similar colour. The leaves thus symbolically seem to glow with a light that is more turbulent and agitated than that of the blossoming flowers in the foreground. The present picture symbolically illustrates the mutuality of nature and light, recalling Klimt's earlier (albeit very different) use of the tree as a symbol, one of the "tree of life". "*Apple tree I*" is regarded to be one of the artist's most profoundly private and meditative works.

B-22



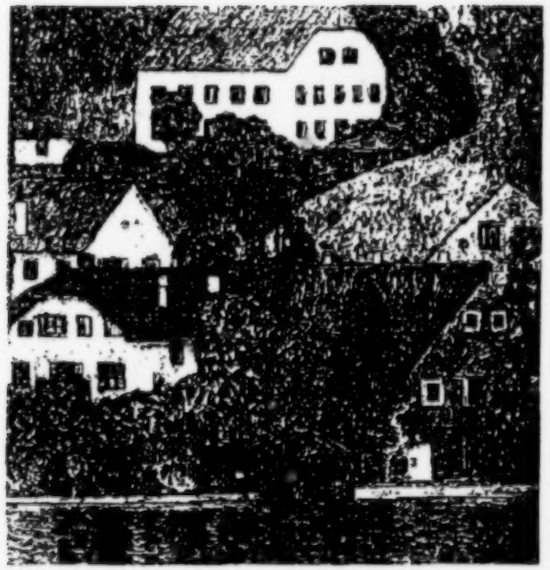
B-23

HOUSES IN UNTERACH AM ATTERSEE. Around 1916
Oil on canvas, 110 x 110 cm
Unsigned
Inventory No. 4209
Acquired in 1948 through the Bloch Bauer bequest, Vienna

Novotny/Dobai, Nr. 159
First exhibition: Gustav Klimt Memorial Exhibition, Secession, Vienna June-July 1928, No. 36

Klimt's late landscapes may be differentiated in several ways from the earlier ones in particular there is more emphasis on colour as a compositional element, a development that is directly related to the greater freedom in painting generally at that time. This freedom is, of course, reflected in all of Klimt's work. In contrast to his earlier representations of pure nature (gardens, meadows and woods) he now devoted himself to architectonic motifs, principally the villages along the banks of the Attersee. The impetus for this change may have been provided by a stay on Lake Garda in the summer of 1913, when he painted two views of small, watered towns. In the present work he integrates the blocks of houses into the surface of the picture, scarcely bothering about the intervening and perspective. The smooth, colourful walls are animated with the rather hermetic painted eyes. On the bank can be seen flowers painted with detailed precision.
The picture dates to a period when the artist was spending the summer months at Weißenbach am Attersee with the Flöge, for whom he was practically one of the family. It was at Weißenbach also that Klimt painted the two views of the forester's house that he himself occupied each summer between 1911 and 1914.

A-24



B-25

EXHIBIT C

Klimt's Women

Edited by
Tobias G. Natter and Gerbert Frodl

DUMONT

C-26

C-27

Portrait of Adele Bloch-Bauer I

1907

The portrait of Adele Bloch-Bauer I is possibly the most famous if not greatest and richest work of his so-called "golden style". Adele Bloch-Bauer was twenty-six years old when Klimt painted her, yet nothing about her appearance can be detected in the portrait. The mastery of the picture goes both a step and a step. Like no other painter, Klimt proposed a definitive [illegible] and established, which [illegible] dates to 1903/04, assuming that a realization of the picture in gold was planned even then.[1] The early date is confirmed by a letter from Adele Bloch-Bauer dated 22 August 1903, in which she discusses the date for the wedding anniversary of her parents on 15 October 1903: "Originally, we children wanted to give them a joint present, but now we have totally abandoned the idea. My husband also [illegible] to have one painted by Klimt, who, however, cannot work before winter. So my parents will get hers in the autumn."[2]

The picture was first exhibited as part of a presentation of projects of the Vereinigung bildender Künstler Österreichs (Association of Austrian Artists) in March and April 1907.[3] The first evaluation of the Viennese public took place on the occasion of the Kunstschau in 1908.[4] In the literary edgewood Zeitung, one could read about an "idol in a golden shrine," while a corresponding verse stated mockingly: "Adele Bloch from Bloch".[5]

The subject is sitting or rather floating in front of a golden chair whose back extends itself only in the most abstract way. All details of the picture—especially the subject's body—seem to dissolve in the splendour of the golden shimmer. As with Byzantine icons, only the face and the hands remain visible under the gold. Still under the "revelatory" spell, Klimt separated from Romako in 1901 "[the museum of unprecedented splendour]".[6]

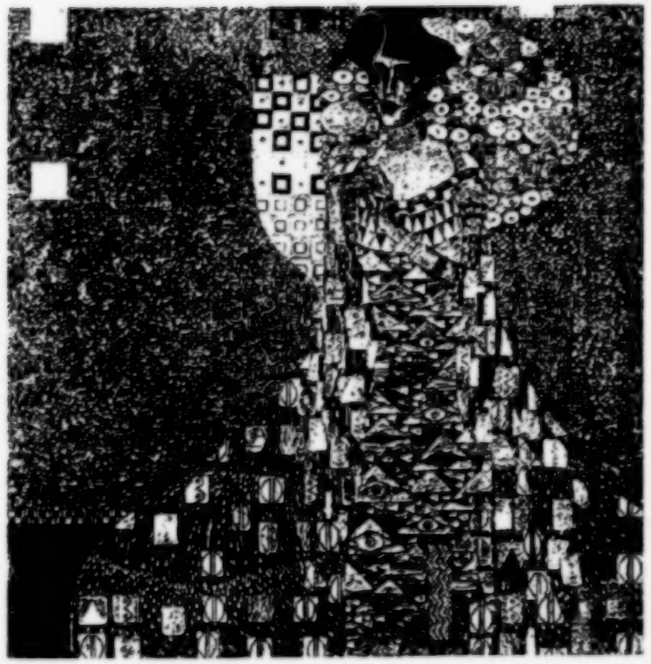
For hours, it was "mosaic painting", with the women's portrait a cross between painting and handicraft, executed with the meticulousness of a goldsmith. Johannes Dobai ascribed a structural role to the gold ornament: "In this case, gold symbolises both as well as space. Ornament as well as space rises in a world detached from itself."[7]

Klimt used this gold in different ways: in the spirit of Japanese landscape painting on the background, producing a diffuse haze, or making the pattern stand out in bold relief and overlaying it with real gold [illegible]. The strongest inner contradiction arises between the picture's wholly abstracted motifs and their concrete explanation. The subject's cool, openly wide stare, to the side, is treated as a sweeping zone of texture. The garment visible underneath is striped with Egyptian geometric motifs, and hangs on the straps from the narrow shoulders. The magic of the geometry, the perfect

Gustav Klimt, Adele Bloch-Bauer I, 1907

C-28

C-29



C-30

[illegible]

Maria Altmann, the only niece still alive, remembers her aunt whose passing it of its demanded an endless investigation towards the architectural. She describes Adele was the following attributes: "Sick, suffering, always with headache, smoking like a chimney, terrible 'self' first. A spiritual face with elegant Constantin arrogant" that was the impression she made on my adult I was a child, always sent my intellectual immature son." She is also mentions a crooked finger that the aunt always tried to conceal. This is reportedly why Klimt chose this particular hand position in the portrait.

In December 1918, Ferdinand Bloch Bauer bought the house at 16 Elisabeth strasse, nearly opposite the Academy in Schillerplatz. Here, Adele Bloch Bauer established the hospitality that had turned her house into one of the centres of the Viennese fin de siècle. In the 1920s, she continued to gather intellectuals, artists and Social Democratic politicians round her. Alma Mahler-Werfel and her husband, Richard Strauss, Stefan Zweig, Julius Meinl-Reisenbach, Karl Renner, and police "minister Schober" were frequent guests at her house. As her niece Maria Altmann remembers: "Adele was not happy at home. She wanted to study, which was not customary for a young girl at that time, so she married instead."[7] She was a dilettante who had private studies in German, French and English literature.

Adele Bloch Bauer died on 24 January 1925,[8] when she was just over 43 years old. Her cause of death was given as meningitis, but it is probable that she died of tuberculosis, which was not publicly admitted to be the cause of death because of the stigma attached to the disease. Her husband, Ferdinand Bloch Bauer, was a prominent sugar industrialist and a generous patron of the arts. He was also a passionate collector of paintings, porcelain and antiques. Adele's death left him devastated. He commissioned Gustav Klimt to paint a portrait of his wife, which was completed in 1907. Klimt's work was influenced by the Byzantine mosaics he had seen in Ravenna in 1903, and by the Minoan and Mycenaean art he had seen in Athens in 1905. The portrait of Adele Bloch Bauer is one of Klimt's most famous works. It depicts Adele in a golden dress, surrounded by a golden background. The dress is decorated with geometric patterns and symbols, and Adele's face is serene and beautiful. The portrait is a masterpiece of the Art Nouveau style, and it is considered to be one of the most important works of art in Austria.

After Adele's death, Ferdinand Bloch Bauer left Austria and moved to Switzerland. He died in Zurich on 13 November 1945. The Nazis had confiscated his property in Austria, and he was forced to flee the country. He left behind a will in which he bequeathed his collection of paintings to the Austrian state. However, the will was contested by his heirs, and the paintings were not returned to the family until 2006. The case of Adele Bloch Bauer's portrait is one of the most famous examples of Nazi-era looted art. The painting was stolen by the Nazis in 1938, and it was not returned to the family until 2006. The case of Adele Bloch Bauer's portrait is one of the most famous examples of Nazi-era looted art. The painting was stolen by the Nazis in 1938, and it was not returned to the family until 2006.

C-31

C-32

Portrait of Adele Bloch-Bauer II

[illegible]

Adele Bloch-Bauer was the only woman who had enough wealth and enthusiasm for the arts to be painted more than twice by Gustav Klimt. The first picture (fig. p. 113), where the subject is sitting, was long kept among the family treasures. A conventional likeness that apparently had been cool to the sitter's formality, Klimt divides the background into fourteen nearly equipotent areas of silver, mid, gray and gold. Gallop ing rectangular shapes from Asian examples enliven the tapestry zone.

There is a most difference between the two Bloch-Bauer portraits. With the stunning portrait of Adele Bloch-Bauer, Klimt developed from a comparatively neutral color to a fantastic effect. The painter in 1912 the art historian Hugo Haberler said about an "Austrian" new beginning. "I think the artist is going to build a new, ideal portrait, so to speak, of the lady, to find personality formed exclusively in gold and silver. We should."

Yet "beautiful, so to speak" a work of allusion to [illegible] is new. The motifs key prominently in the use of color. This symbolism of colors, as well as the new treasure as the artificial, was already to be found in Klimt's landscapes, but now for the first time these features play a role in the portrait. The ornaments, because of their symbolic were also created by the young inner [illegible]. Obviously, the Egyptian [illegible] of the Vienna Secession [illegible] in 1909 [illegible] and the mission [illegible] as well as the exhibition of his works in Paris in 1908 and Brussels in 1911 [illegible] the ultimate development of this trend in the Adele [illegible].

In connection with the portrait Adele Bloch-Bauer I (p. 116), some interesting comparisons [illegible] between the two [illegible] Both represent the sitter [illegible] the [illegible]. The [illegible] of the [illegible] [illegible] with [illegible] Adele appears in any [illegible] [illegible] [illegible]

Portrait of Amalie Zuckerkandl

C-35

C-36

EXHIBIT D

AUSTRIAN INFORMATION

WASHINGTON, D.C. Volume 53, No. 7/8, July/August 2000

VIENNA MODERNISM
1890 - 1910

AUSTRIAN INFORMATION, in a series of issues, will present its readers with Austrian Modernism. Picture above: "Lady in Gold" (Portrait Adele Bloch-Bauer) by Gustav Klimt, ca. 1907, Austrian Gallery

E-04

Supreme Court, U.S.
FILED
JUL 23 2003
OFFICE OF THE CLERK

No. 03-13

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the expropriation clause of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3) support the exercise of federal jurisdiction over the Republic of Austria as to artworks looted in violation of international law during World War II?

2. Is there an issue of whether a foreign state is a person under the Due Process Clause of the Fifth Amendment of the Constitution, where a court exercises personal jurisdiction over that state after finding that both the statutory requirements of the FSIA and the due process "minimum contacts" test are satisfied?

3. Is exhaustion of remedies in the foreign state a prerequisite for subject matter jurisdiction under the expropriation clause of the FSIA?

4. Is the promotion of a national museum a commercial activity under the expropriation clause of the FSIA?

5. When both a foreign state and its agency or instrumentality are sued in the same action, may venue lie in the jurisdiction where the agency is doing business pursuant to 28 U.S.C. § 1391(f)(3), or must the action be brought in the District of Columbia pursuant to 28 U.S.C. § 1391(f)(4)?

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STATEMENT OF THE CASE

This action was brought by Respondent Maria V. Altmann, an 87-year-old American citizen, to recover six paintings by Gustav Klimt confiscated from her uncle by the Nazis during World War II. The paintings are in the possession of Petitioner Republic of Austria ("Austria"), a foreign state, and housed in the museum operated by Petitioner Austrian Gallery ("the Gallery"), an agency or instrumentality of Austria (Austria and the Gallery are collectively referred to as "Petitioners"). Following her uncle's death in 1945, Petitioners withheld the paintings from Mrs. Altmann under false pretenses that have only very recently been revealed to her as a result of an investigation conducted by an Austrian journalist.

Petitioners' recitation of the facts of the case is replete with errors, misstatements and misleading half-truths concerning the merits of Mrs. Altmann's complaint. Because most of these are not very material to the legal issues in this Petition, Mrs. Altmann respectfully refers the Court to the factual summaries set forth in the comprehensive opinions of the District Court, *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001) ("*Altmann I*"), and the Ninth Circuit Panel, *Altmann v. Republic of Austria*, 317 F.3d 954, *rhrg. denied and opinion amended*, 327 F.3d 1246 (9th Cir. 2003) ("*Altmann II*"), copies of which are attached to Petitioners' brief as Appendices B and A, respectively, which more accurately reflect the allegations in Mrs. Altmann's complaint.

Contrary to Petitioners' assertions, the centerpiece of Mrs. Altmann's Complaint is *not* the 1923 will of her aunt Adele, but rather the property rights of her uncle Ferdinand Bloch-Bauer, who specifically named Mrs. Altmann as one of his three heirs. It was Ferdinand who owned the Klimt paintings at issue, and it was Ferdinand who was forced to flee into exile as the Nazis, including employees of the Gallery, divided up his estate and looted his valuable artworks. Upon his death in 1945, Ferdinand willed his entire estate to his nieces and nephew. His claims to recovery of the Klimt paintings were an important part of that estate. As the

documents clearly demonstrate, the Petitioners have misrepresented Adele's. The will is and indeed should be a non-issue, a conclusion that the District Court is bound to come to when it hears evidence in this case.[1]

Additionally, Petitioners cannot rely on the purported agreement obtained from Mrs. Altmann's brother's attorney, Dr. Gustav Rinesch, in 1948. The Austrian government has itself recently declared that such post-war agreements are invalid and indefensible. That conclusion is not surprising, because cases such as this one demonstrate that the Petitioners knowingly deceived claimants and improperly extorted artworks from them in the post-war era.

Stripped to its essentials, this case thus concerns Petitioners' complicity in the looting of the artworks, and Petitioners' abject and continuing failure to comply with their

1. Straining credulity, Petitioners purport to rely on the clearly precatory language of Adele's 1923 will: "I kindly ask my husband to bequeath my two portraits and the four landscapes by Gustav Klimt after his death to the Austrian National Gallery in Vienna. . . ." However, under Austrian, as well as American law, such a request is considered entirely precatory and unenforceable. *See In re Estate of Barnhardt*, 226 Cal. App. 2d 289, 301 (1964) (request that daughter donate property to state as museum upon daughter's death held unenforceable). The request is also in contrast with Adele's mandatory language in her other bequests. Indeed, in the probate proceedings after Adele's death in 1925, Ferdinand's lawyer (Mrs. Altmann's father who died in 1938) stated in reference to Adele's request, "they do not have the mandatory quality of a testamentary disposition. It has to be pointed out that the Klimt paintings mentioned are not the property of the testatrix but of her widower." The evidence uncovered to date demonstrates that Petitioners knew that Adele's purported bequest was unenforceable (especially after the events that befell the Bloch-Bauer family during the Nazi period) and nevertheless purposely misled Mrs. Altmann's attorney and extorted a "donation" of the paintings in 1948 in exchange for export permits for other paintings. Mrs. Altmann learned the truth only in 1999, thanks to the work of an Austrian journalist, Hubertus Czernin, who uncovered internal documents demonstrating the fraud that had been perpetrated against her and other Austrian Jewish victims of the Nazis who had attempted in the post-war era to recover their artworks. *See* Hubertus Czernin, *Die Fälschung. Der Fall Bloch-Bauer*, Vol. I-II (Czernin Verlag Vienna 1999); Thomas Trenkler, *Der Fall Rothschild. Chronik einer Enteignung* (Czernin Verlag Vienna 1999).

post-war duties and obligations to return the paintings to their rightful owners. When Petitioners obtained the looted paintings - whether during World War II, shortly after the conclusion of the War, or not until 1988 (as in the case of the *Amalie Zuckerkandl* portrait) - is not material to the jurisdictional issues. Petitioners cannot avoid the simple and inescapable fact that all of the paintings were taken from Mrs. Altmann's uncle in violation of international law, and they are now in the possession of the Petitioners who are wrongfully withholding them from her.

Petitioners' recitation of the "facts" with regard to the application of the recent Austrian restitution law and Mrs. Altmann's efforts to pursue a remedy in Austria is also highly misleading. First, there were certainly no formal "proceedings" before the art restitution commission created to advise the Austrian government under the 1998 art restitution law, nor did Appellants permit any formal "claims" to be made by Mrs. Altmann. In fact, all of the efforts by Mrs. Altmann to participate before the commission were thwarted. As alleged quite clearly in the Complaint, the entire commission proceeding was a sham and the outcome was politically pre-ordained.

Similarly, Mrs. Altmann was denied an opportunity to litigate the matter in Austria. Petitioners concede that the required statutory court fees of almost $2 million far exceed Mrs. Altmann's assets. Upon Mrs. Altmann's application, an Austrian court reduced the fees but ruled that she had to pay her entire life savings of $200,000, holding that "savings accounts may not be spared to the disadvantage of the general public." Not satisfied with this harsh result, Petitioners filed an appeal to reverse the decision in its entirety. Petitioners sought to raise the fees back to the higher statutory amount (almost $2 million) and to include in the fees the value of artworks that had not yet even been returned to Mrs. Altmann when she made her initial application. To this day, Petitioners maintain that Mrs. Altmann must deposit almost $2 million in court fees, far in excess of her assets, in order to litigate this matter in Austria. Austria also refused to waive or extend the

statute of limitations, even though the new 1998 art restitution law directs the government to return artworks notwithstanding that purported defense. Having no other recourse, Mrs. Altmann filed suit in the Central District of California, where she has resided since 1942, having herself narrowly escaped the clutches of the Nazis whose successors in interest now torment her with endless procedural appeals and delays.

REASONS FOR DENYING THE PETITION

This is a unique case arising out of a complex of particular historical circumstances and raising only very fact-specific legal issues. There is nothing here which requires this Court's attention.

First, what Petitioners characterize as a serious split of authority among the circuits is no such thing. Indeed, and perhaps most tellingly, neither of the two circuits recently addressing the core issue concerning the purported retroactivity of the FSIA has disagreed with the Ninth Circuit Panel's holding or approach to the retroactivity question at issue in this case.

As will be demonstrated more fully below, there is no actual conflict among the circuits concerning the law with regard to the retroactivity of the FSIA, nor is there any disagreement over the application of that law. Furthermore, none of the other issues raised by Petitioners warrant serious consideration by this Court. The most potentially interesting of them – whether a foreign state is a person entitled to due process – is not properly presented because the Ninth Circuit Panel expressly declined to rule on that issue and instead conducted a standard "minimum contacts" analysis. None of the other contentions of error on this interlocutory appeal are valid and, even if they were sound, they are not of broad enough importance to justify the granting of a writ of certiorari in this case. Rather, Mrs. Altmann respectfully requests that the case be allowed to proceed so that her claim to her uncle's paintings can be determined on the merits within her lifetime.

I. THERE IS NO CIRCUIT SPLIT ON THE RETROACTIVITY OF THE FSIA AND NO COMPELLING FOREIGN POLICY INTEREST AT STAKE IN THIS LITIGATION

A. Jurisdiction Under The FSIA In This Case Is Not Impermissibly Retroactive.

Federal jurisdiction over claims by United States citizens against foreign states is authorized in Article II, Section 2 of the Constitution of the United States. As a matter of grace and comity, but certainly not of right, United States courts generally declined to hear cases against foreign states until the middle of the last century. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). However, in the 1920's and 1930's, as the Ninth Circuit Panel has pointed out, the concept of "absolute sovereign immunity" began eroding and was already no longer recognized in several foreign states (including Austria).[2] The State Department announced in the so-called Tate Letter of 1952 that it had adopted the "restrictive theory" of sovereign immunity which permits suits against foreign sovereigns for certain actions. Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney

2. The phrase "absolute sovereign immunity" has been used to characterize the standpoint of United States jurisprudence prior to 1952. However, a closer reading of the arguments made by Chief Justice Marshall in *The Schooner Exchange* and Justice Story in *The Santissima Trinidad* reveals that the original concept was not "absolute" at all, but was in reality much closer to the so-called "restrictive theory" of sovereign immunity later espoused in the 1952 Tate Letter and embodied in the FSIA. *See, e.g., The Schooner Exchange v. McFaddon*, 11 U.S. 116, 143 (1812) ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual"); *The Santissima Trinidad*, 20 U.S. 283, 353 (1822) (permitting jurisdiction over cargo in foreign warship) ("If [a foreign sovereign] comes personally within our limits, although he generally enjoy a personally immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation."). *See also Republic of Mexico v. Hoffman*, 234 U.S. 30 (1945) (exercising jurisdiction over Mexican ship in absence of State Department request for immunity).

General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. of State Bull. 984-85 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (Appendix 2 to opinion of White, J.).

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, enacted in 1976, formalized this approach, and now "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). The stated purpose of the FSIA was to

> insure that this restrictive principle of immunity is applied in litigation before U.S. courts. . . . A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

H.R. Rep. No. 94-1487 at 7; 1976 U.S.C.C.A.N. at 6605 (1976).

The principal question raised by the Petitioners is whether the application of the FSIA to events predating its effective date (or predating the Tate Letter) is impermissibly retroactive.[3]

3. It should be noted that the Court has previously considered several cases where the FSIA or the Tate Letter were applied retrospectively. *First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 619-21 (1983) (concerning Cuban expropriations in 1960-61); *Verlinden*, 461 U.S. 480 (concerning transactions in 1975); *Nat. City Bank of New York v. Republic of China*, 348 U.S. 356 (1955) (concerning transactions in 1920 and 1947-48); *see also Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maat-Schaapj*, 173 F.2d 72 (2d Cir. 1949), *modified by* 210 F.2d 375 (2d Cir. 1954) (per curiam) (applying 1949 Tate Letter to conduct preceding and during World War II). Further, claims of immunity have traditionally been evaluated as of the time of suit. *See In re Muir*, 254 U.S. 522 (1921) (court considered British requisition of ship for use as admiralty transport at time of suit); *In re Hussein Lutfi Bey*, 256 U.S. 616 (1921) (court considered status (Cont'd)

This Court has set forth a two-part test to answer this question: (1) whether Congress has directed with the requisite clarity that the law be applied retrospectively; and (2) whether application of the new statute produces an impermissible retroactive effect. *I.N.S. v. St. Cyr*, 533 U.S. 289, 316-20 (2001); *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

1. Did Congress clearly intend the FSIA to apply retroactively?

A reasonable argument can be made that the language of the FSIA itself demonstrates an intention to apply the law retrospectively. The preamble of the FSIA concludes "Claims of foreign states to immunity should henceforth be decided by the courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. Indeed, in dicta relying on *Landgraf*, the majority in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), forcefully made this argument, which is also consistent with the State Department's concurrent pronouncements on the statute it had helped draft,[4] but in conflict with the holdings of two other circuits. *See Carl Marks & Co. v. U.S.S.R.*, 841 F.2d 26 (2d Cir.), *cert. denied*, 487 U.S. 1219 (1988); *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987). Subsequently, in *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), the

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of Turkish ship in light of breakoff in relations between United States and Ottoman Turkey at time of suit); *The Gul Djemal*, 264 U.S. 90 (1924) (same); *Compania Espanola de Navegacion Maritima, S. A. v. The Navemar*, 303 U.S.68, 73-74 (1938) (court considered status of ship requisitioned by Spanish government at time of suit); *Ex Parte Republic of Peru*, 318 U.S. 578, 588 (1943) (court considered the good relations between Peru and the United States at time of suit).

4. *See* Letter of Monroe Leigh, Legal Adviser, to Edward H. Levi, Attorney General (November 2, 1976), reprinted in 75 Dept. of State Bull. 649-50 (1976) ("since [the FSIA] will not have any effect whatsoever on the running of the statute of limitations, a continuation of existing policy on attachment until [the effective date] might be the only way a claim for relief could be preserved"); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 851 (S.D.N.Y. 1978) (State Dept. concurred in applying FSIA to case that arose prior to enactment).

D.C. Circuit moved away from its prior dicta in *Princz*, and adopted the view of the Second and Eleventh Circuits.

This case has not rekindled the conflict. While the District Court adopted the approach of the *Princz* majority in *Altmann I*, the Ninth Circuit Panel resolved this potential split by premising its ruling on the second prong of the retroactivity analysis rather than the first.

2. Does the Expropriation Clause of the FSIA have an impermissibly retroactive effect?

This Court has held that "[t]he inquiry into whether a statute operates retroactively demands a common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' This judgment should be informed by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin v. Hadix*, 527 U.S. 343, 357-8 (1999), quoting *Landgraf*, 511 U.S. at 270. As this Court has stated on several occasions, a statute which merely confers or ousts jurisdiction does not normally raise any retroactivity concerns.[5] *Landgraf*, at 274-5. The *Landgraf* rule was in turn clarified by this Court in a unanimous decision in *Hughes Aircraft Co. v. United States ex rel Schumer*, 520 U.S. 939 (1997) in the following language:

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all.

Hughes, 520 U.S. at 951 (emphasis in original) (citations omitted). In the current case, the expropriation clause of the FSIA operates in exactly the fashion described in *Hughes*, by affecting only *where* the suit may be brought, not *whether* it may be brought at all. It does not unsettle the expectations of the parties, nor does it unfairly attach new consequences to actions taking place before its enactment.

Petitioners do not, and cannot, suggest that they are now, or have ever before been, absolutely immune (both here *and* in Austria) from the claims Mrs. Altmann has asserted. They concede that the claims could always be brought in Austria and have argued that Mrs. Altmann should be required to do so. Where, therefore, a United States citizen seeks redress against a foreign state, a purely jurisdictional statute such as 28 U.S.C. § 1605(a)(3) merely confers jurisdiction in a domestic forum for litigation which the American citizen otherwise would have been forced to bring in the foreign state.[6] This neither unsettles the expectation, nor insults the dignity of the foreign sovereign. *See Nat. City Bank of New York*, 348 U.S. at 363-4 ("No parochial bias is manifest in our courts which would make it an affront to the 'power and dignity' of the Republic of China for us to subject it to counterclaims in our courts when it entertains affirmative suits in its own.")

The Ninth Circuit Panel's Opinion properly distinguishes the current case *on the facts* from the earlier cases in which a sovereign's prior expectation of *absolute* immunity (here and abroad) was upheld *on the facts*. (Petitioners' Appendix A, pp. 20a-21a, distinguishing *Carl Marks* and *Jackson*.) In each of

5. In *Dole Food Co. v. Patrickson*, __ U.S. __, 123 S. Ct. 1655 (April 22, 2003), a case brought under the FSIA, this Court confirmed the "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Dole*, *18-*19 (quoting *Keene Corp . v. United States*, 508 U.S. 200, 207 (1993) (quoting *Mollan v. Torrance*, 22 U.S. 537, 539 (1824)). The decision to exercise jurisdiction, being a function of the statutory authority of the court and the status of the parties at the time the suit is brought, can therefore never be impermissibly "retroactive."

6. There is no basis for the suggestion that a party has an "expectation" that United States jurisdictional rules governing international disputes will remain the same and that therefore a statute that confers jurisdiction in the United States unsettles the expectations of the parties that United States courts will not assert jurisdiction. If this were true, then every statute that conferred or ousted jurisdiction would raise retroactivity concerns, which is clearly contrary to this Court's holdings in *Landgraf* and *Hughes*.

those cases, the foreign state arguably presumed it was absolutely immune from suit (in its own courts as well as in the United States) when it entered into the commercial transactions at issue. As demonstrated here and in *Altmann II*, Austria could never have held such an expectation because it always has been liable in its own courts for suits seeking the return of Nazi-looted property. Further, the United States consistently took the position during and after World War II that expropriated property would have to be returned and that United States courts could exercise their jurisdiction to affect the restitution of Nazi-looted property.

First, as the Ninth Circuit Panel explained this case concerns the return of property taken in violation of long-standing rules of international law. In March 1938, Austria was annexed by Nazi Germany. As a result, and as part of official state policy, the property of Jews in Austria, including the paintings at issue in this case, was expropriated. As the Ninth Circuit Panel has pointed out, and as numerous courts have held in similar cases, this expropriation was contrary to international law. Indeed, in January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory (the "London Declaration"), warning "that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled." 8 Dept. of State Bull. 21-22 (1943). Later that year, in the so-called "Moscow Declaration" of November 1, 1943, Austria was declared the first "victim" of Hitlerite aggression, but at the same time "reminded, however that she has a responsibility which she cannot evade for participation in the war on the side of Hitlerite Germany, and that in the final settlement account will inevitably be taken of her own contribution to her liberation." 9 Dept. of State Bull. 310 (1943).

As an occupied country after March 1938 and at the time of the London Declaration and Moscow Declaration in 1943, Austria of course could have had no "expectation" that it would be immune from actions to return property expropriated from Jews during the War. After the War, Austria

was occupied by the United States and the other Big Four allies and its new government was recognized by the Allies in January, 1946. 14 Dept. of State Bull. 81 (1946). Still under United States control and influence,[7] in May 1946 Austria passed the so-called *Nichtigkeitsgesetz* (Nullity Law), BGBl No. 106/1946 declaring all transactions that occurred as a result of Nazi persecution "null and void." Austria was further obligated by the United States to enact a series of laws designed to accomplish restitution of Nazi-looted property.[8] The first two of these laws, enacted in July 1946 and February 1947, permitted claims by individuals against the Republic of Austria for the return of confiscated property that fell into government hands.[9] Therefore, as early as 1946-47 legislation existed in Austria, a foreign state then occupied militarily by the United States, permitting claims for the return of expropriated property such as the ones made by Mrs. Altmann in this case.[10]

7. *See United States v. Portrait of Wally*, 2002 U.S. Dist Lexis 6445, *27 (S.D.N.Y. 2002) ("'Until the signing of the Austrian State Treaty of 1955, the allies would 'sit in judgment' of the Austrian government, in that all official acts required their approval.").

8. In American controlled areas of Germany, the United States enacted Military Law 59 (approved 10 November 1947), the stated purpose of which was "to effect to the largest extent possible the speedy restitution of identifiable property . . . to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism." The United States insisted that similar legislation be adopted by Austria.

9. First Restitution Act: Federal Law of July 26, 1946, concerning the restitution of seized property at present administered by the Federal Government or the Provincial Governments; Federal Law Gazette/BGBl No.156/1946. Second Restitution Act: Federal Law of February 6, 1947, concerning the restitution of seized property at present held by the Republic of Austria; Federal Law Gazette/BGBl No.53/1947. For the text and a discussion of the related Third Restitution Act of February 1947 permitting claims against third parties see *Altmann v. Commissioner*, 20 T.C. 236 (1953), remanded without opinion, 48 A.F.T.R. (P-H) P1867, 55-2 U.S. Tax Cas. (CCH) P9599 (2d Cir. 1955), a case coincidentally concerning Mrs. Altmann's brother-in-law Bernhard Altmann.

10. The history of Nazi-era expropriations and post-war restitution laws has been recently compiled by the Austrian Historical Commission,

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Meanwhile, in the United States the government also took steps to establish jurisdiction over disputes concerning Nazi-era expropriations. In 1949, the State Department issued a press release along with a letter submitted by Jack B. Tate in the *Bernstein* case announcing that

> it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and . . . the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Press Release No. 296, "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," reprinted in *Bernstein*, 210 F.2d at 375-76.[11] Finally, in its 1955 treaty with Austria, the United States continued to insist that Austria return all Nazi-looted property to its former

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whose reports have been published on the website http://www.historikerkommission.gv.at. *See also* Robert Knight, *Restitution and Legitimacy in Post-War Austria 1945-1953*, Leo Baeck Inst. Yearbook XXXVI, pp. 413-441 (1991); Robert Knight, *Ich bin dafur die Sache in die Länge zu ziehen* (Böhlau Vienna, 2000).

11. The contention that the 1949 *Bernstein* letter concerned only the act of state doctrine, and not sovereign immunity, does not dispel the conclusion that the United States did not consider sovereign immunity to be a bar to expropriation claims arising out of World War II. Certainly, as an occupying power, the United States did not permit Germany and Austria to assert a sovereign immunity defense to these claims in their own courts. Indeed, the very first restitution laws enacted in Austria at the behest of the United States were the laws permitting claims against the State of Austria. It seems pointless to speculate what a hypothetical President Truman administration might have done if confronted with this case in the immediate post-war era. But at the very least, based on the statements referenced above, Austria's government could not have had any "expectation" of immunity from these types of claims.

owners.[12] *Multilateral Austrian State Treaty*, TIAS 3298; 6 U.S.T. 2369; 1955 U.S.T. Lexis 35 (May 15, 1955); *See* Appendix C – 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria ("STRIDA"), Article 26, paragraph 1. In subsequent discussions, the United States confirmed to Austria that "the Government could not prevent private persons from advancing claims or arguing with the Austrian Government." Memorandum of Conversation between Secretary of State John Foster Dulles and Chancellor Julius Raab, May 19, 1958, reprinted in *Foreign Relations of the United States, 1958-1960*, Vol. IX, pp. 769-70 (1993).[13]

As set forth in Mrs. Altmann's Complaint, Petitioners fraudulently withheld and extorted from Mrs. Altmann the paintings at issue with false claims of ownership dating back prior to the War and with threats of denials of export permits for other artworks (a practice that Austria now concedes was illegal). Petitioners have never been immune from suit for these pernicious acts, nor from suit to recover the looted paintings. Indeed, as an integral part of their otherwise unsuccessful *forum non conveniens* argument below, Petitioners asserted that they could still be sued for the return of the paintings by

12. Indeed, Congress was told that the treaty "provides that Austria will make restoration or provide compensation to victims of nazism, who were largely those of Jewish faith." Statement of John Foster Dulles, Secretary of State, before the United States Senate Committee on Foreign Relations, June 10, 1955, p. 4.

13. Art claims and unknown claims, such as the ones presented by Mrs. Altmann in the current case, have never subsequently been resolved. In a May 15, 1959 letter regarding the settlement of Article 26 claims for restitution, U.S. Ambassador to Austria H. Freeman Matthews concluded:

> My Government has instructed me to advise you that it may approach the Austrian Federal Government in the future in connection with the settlement of individual claims asserted under Article 26 of the State Treaty which are not presently known to my Government and do not fall within the classes and categories of claims enumerated in paragraphs 1 and 2 of Section A of your note [which do not including artworks].

Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, TIAS 4253, 10 U.S.T. 1158, 1959 U.S.T. Lexis 253 (1959)

Mrs. Altmann in Austria (notwithstanding statute of limitations problems and excessive court costs that in reality make such a suit impracticable). Obviously, Petitioners have never had any expectation of "immunity" with regard to individual claims for the return of Nazi-looted artworks to their former owners.

The expropriation clause of the FSIA attaches no "new legal consequences" to the events at issue in this case. The FSIA was not intended to affect substantive law concerning the rights of foreign states. *First Nat. City Bank*, 462 U.S. at 620-21; H.R. Rep. No. 94-1487 at 12, 1976 U.S.C.C.A.N. 6604, at 6610 ("The bill is not intended to affect the substantive law of liability."). The most Petitioners can argue is that the FSIA allows the case to proceed in the United States, when it might otherwise have been required to proceed in Austria. But this obviously is an argument about *where* the case may be brought, not *whether* it may be brought at all. *Hughes, supra*. As such Petitioners have failed to demonstrate an impermissible retroactive effect to the exercise of jurisdiction in this case.

B. The Circuits Are All In Agreement On the Core Issue Of How To Analyze The Retroactivity of the FSIA.

Petitioners' contention that the circuit courts are split on the issue of how to analyze the FSIA's retroactivity is highly misleading. In fact, there is a clear unanimity of approach and a widespread acceptance of the principles set forth in *Landgraf*. That the results in the various cases have differed is a function only of the "common sense, functional judgment" based on the particular facts presented in each case. *Martin*, at 357. Notably, none of the courts that have subsequently reviewed the issue has disagreed with the Ninth Circuit's decision in *Altmann II*.

In *Hwang Geum Joo*, decided the day Petitioners submitted their brief, the Circuit of the District of Columbia studiously avoided a conflict with *Altmann II*, holding only that the assertion of jurisdiction over Japan under the commercial

activity exception of the FSIA, 28 U.S.C. §1605(a)(2), would be impermissibly retroactive because it would conflict with the settled expectations of Japan, arising principally from its 1951 treaty with the United States, that such claims would not be made in United States courts. As the Court noted, and as determined by the Ninth Circuit, no such treaty provision exists with Austria. *Hwang Geum Joo*, 332 F.3d 679 ("Because there was no similar treaty with Germany or Austria, and therefore no similar settled expectation, the opinion in *Altmann* is not relevant to the present case."). Further, with regard to Japan there was no similar statement of policy to the 1949 Tate Letter. *Id.* ("The lack of such a statement . . . distinguishes this case from *Altmann*"). *Altmann II*, the D.C. Circuit concluded, was distinguishable on the facts, not wrongly decided.

A few weeks earlier in *Abrams v. Societe Nationale Des Chemnis De Fer Francais*, 332 F.3d 173 (2d Cir. 2003), the Second Circuit remanded a case concerning the French National Train Company for a determination whether application of the FSIA to provide immunity to a foreign corporation would impermissibly oust jurisdiction that existed prior to the enactment of the FSIA, or whether the French entity could have expected immunity even then. In doing so, the Second Circuit conducted the same retroactivity analysis as the Ninth Circuit Panel and then cited *Altmann II* for the proposition that it was possible that an agency of a foreign state did not have an expectation of immunity for World War II-era claims. In *Abrams*, as in *Hwang Geum Joo*, the Second Circuit did not disagree with or disapprove of the Ninth Circuit's holding or reasoning in *Altmann II*.

Far from a circuit split, the various decisions merely reflect the results of the careful analysis required by this Court in determining whether a particular statute would have an impermissibly retroactive effect under the particular circumstances of each case. As Judge Charles Breyer explained in another recent post-*Altmann II* case, *Cruz v. United States*,

2003 U.S. Dist. LEXIS 10948 (N.D. Cal. 2003), decided June 24, 2003:

> Though Altmann held that the FSIA could be applied retroactively under certain limited circumstances, it did not thereby change the law. . . . Rather, the Ninth Circuit simply applied well-established principles of retroactivity to find that absolute sovereign immunity was not available under the narrow set of facts presented in that case. . . . Altmann changed neither the law of sovereign immunity nor the analysis that the Court was required to conduct to determine whether the FSIA applied to the claims at issue. . . .

Cruz, at *8-*10. Judge Breyer's view of *Altmann II* is clearly correct. The Ninth Circuit's Opinion neither creates new law, nor contradicts the old. There is therefore no legitimate reason to grant a writ of certiorari in this case.

C. No Foreign Policy Interests Are Actually At Stake In This Litigation.

The parade of horribles brought forth by Petitioners (and by the United States Government as *amicus curiae* below) has not, and will not, come to pass. *Altmann II* is a unique case, decided on unique facts that have not translated to other more ill-defined cases. Indeed, it might be respectfully suggested that the United States' presence in this cas as an *amicus* was based on a misguided view of the applicability of the ruling.

One good example of the limited and unique nature of the *Altmann II* ruling is the ruling of Judge Breyer in the *Cruz* case cited above. In *Cruz*, Judge Breyer denied reconsideration of his earlier ruling dismissing a class action lawsuit against Mexico on sovereign immunity grounds, finding that, unlike Austria in *Altmann II*, Mexico had an expectation of immunity for the claims asserted in that case. *Cruz*, at *11.

Similarly, on April 15, 2003, Judge Florence Marie Cooper (the same district court judge who affirmed jurisdiction in *Altmann I*) in a thoughtful opinion dismissed a class action suit asserting World War II-era expropriation claims against

Austria on the grounds of the executive's foreign policy power under the political question doctrine. *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098 (C.D. Cal. April 15, 2003). Judge Cooper's rationale was identical to this Court's reasoning in *Am. Ins. Ass'n v. Garamendi*, __ U.S. __, 156 L. Ed. 2d 376, 2003 U.S. LEXIS 4797 (June 23, 2003), that in the face of a statement of interest by the United States Government asserting that the maintenance of a class action would interfere with an executive agreement between the United States and Austria, the Court could only conclude that the suit would impermissibly interfere with the foreign relations power of the executive branch. *Anderman, supra; Garamendi, supra* (executive agreement bars state insurance statute related to settled claims); *see also Roeder v. Islamic Republic of Iran*, __ F.3d __ (D.C. Cir. July 1, 2003) (executive agreement preempts claims against Iran); *Deutsch v. Turner Corp.*, 317 F.3d 1005, *rehearing denied and opinion amended*, 324 F.3d 692 (9th Cir. 2003) (executive agreements and treaties bar various WWII claims).

In sum, in all of the cases cited above, this and other federal courts have demonstrated that *Altmann II* represents no bar to properly dismissing an action based on the executive foreign policy power and the political question doctrine. However, no such concerns arise in this case because the recent executive agreement concluded between the United States and Austria expressly and conspicuously excludes and preserves individual claims for Nazi-looted artworks. *See* Appendix A – Excerpt from Text of January 17, 2001 Joint Statement and Exchange of Notes concerning the establishment of the General Settlement Fund ("Executive Agreement"). Indeed, Mrs. Altmann's counsel participated at the invitation of the State Department in the negotiation of the Executive Agreement, and in connection therewith obtained a letter from Austria specifically affirming to the State Department that the Executive Agreement would not "affect or pertain to" Mrs. Altmann's case.[14] *See* Appendix B – January 17, 2001

14. Initially, Petitioners nevertheless attempted to assert an "act of state" defense based on the Executive Agreement in their motion to dismiss before the District Court below. After objections were raised by the (Cont'd)

Letter from Hans Winkler, Legal Adviser, Austrian Federal Ministry for Foreign Affairs, to Stuart E. Eizenstat, Deputy Secretary of the Treasury.

Unlike perhaps any other World War II-era cases being litigated at this time, the United States has *not* filed a statement of interest in this case because the case does not, by itself, implicate any foreign policy objectives of the United States. To the contrary, the current case is consistent with the United States' view that Nazi-looted artworks should be returned to their original owners. *See United States v. Portrait of Wally*, 2002 U.S. Dist Lexis 6445 (S.D.N.Y. 2002) (action brought by United States to forfeit painting on loan from Austria that had been looted during the Nazi era); Appendix D – Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 18 (1998).[15] Nor does this case conflict with any existing executive agreement or treaty between the United States and Austria. *See Multilateral Austrian State Treaty*, TIAS 3298; 6 U.S.T. 2369; 1955 U.S.T. Lexis 35 (May 15, 1955); Appendix C – 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria ("STRIDA"), Article 26.

(Cont'd)
State Department, Petitioners expressly withdrew the argument that Plaintiff's claims were barred by the act of state doctrine and filed a statement confirming that

> (1) Plaintiff's claims in this action are not subject to the provisions of the Joint Statement and Exchange of Notes, including those provisions regarding legal closure;
> (2) This action shall not affect the establishment and funding of the General Settlement Fund as provided for in the Joint Statement and Annex A to the Exchange of Notes.

Supplemental Memorandum Re: Motion to Dismiss Under Fed. R. Civ. P. 12(b) filed February 21, 2001.

15. *See also* Stuart Eizenstat, *In Support of Principles on Nazi-Confiscated Art*, December 3, 1998, at http://www.state.gov/www/policy_remarks/1998/981203_eizenstat_heac_art.html; "Plunder and Restitution: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report," December 2000, at http://www.pcha.gov/PlunderRestitution.html/html/Home_Contents.html; Washington Conference on Holocaust-Era Assets (1988), http://fcit.coedu.usf.edu/holocaust/resource/assets/heac2.pdf.

The State Department long ago stopped issuing suggestions of immunity on behalf of foreign states, and it has not issued one here. *See* 75 Dept. of State Bull. 649 (1976) ("The Department of State will not make any sovereign immunity determinations after the effective date of [the FSIA]. Indeed, it would be inconsistent with the legislative intent of that Act for the Executive Branch to file any suggestion of immunity on or after January 19, 1977.")[16]

The United States Government's belated intervention as an *amicus curiae* in support of Petitioners' petition for rehearing to the Ninth Circuit below was presumably driven by its concern, unfounded as it turned out, that the *legal* holding in *Altmann II* would be broadly applied to prevent dismissal in *Anderman*, *Hwang Geum Joo*, *Cruz* and other similar World War II-era cases where, unlike in *Altmann II*, the Government was obligated to defend its executive agreements and treaties precluding such claims. But the feared result has not come to pass and *Altmann II*, which concerns a very discrete expropriation claim expressly preserved and not settled or barred by any executive agreement or treaty, has properly been distinguished and limited to its unique facts.[17]

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16. The deference normally accorded to the views of the United States Government in cases of this type is therefore less than it would normally be. The United States' role as an *amicus curiae* below merely reflected the current government's views with regard to statutory construction of the FSIA, but was not an expression of the government's foreign policy preferences or goals. Further, the Government's opinion about what a hypothetical Truman administration would have done with regard to an immunity claim in a suit such as this one must be considered purely speculative and of little value to the discussion of the issues in this case, as it is not only contrary to the available historical evidence, including contemporaneous statements issued by the State Department, but wholly unsupported by any other evidence in the record.

17. Presumably the Second Circuit, in deciding the pending appeals in *Garb v. Republic of Poland*, 02-7844 (2d Cir.) and *Whiteman v. Dorotheum*, 02-9361, 02-3087 (2d Cir.), will dispose of those class action cases in the same way as the Courts in *Joo*, *Anderman*, and *Cruz* disposed of theirs, by distinguishing *Altmann II* on the facts. As a result, the State Department's concerns should be resolved.

There being no basis for he contention that the Ninth Circuit Panel misapplied the controlling legal standard governing the retroactivity of jurisdictional statutes, or that a split among the circuits exists, or even that the current case raises foreign policy concerns, Mrs. Altmann respectfully suggests that the case does not meet the criteria for granting a writ of certiorari on the first question presented.

II. THE QUESTION OF WHETHER FOREIGN STATES ARE ENTITLED TO DUE PROCESS PROTECTION IS NOT PROPERLY PRESENTED BY THIS CASE

Personal jurisdiction over a foreign state exists by federal statute where subject-matter jurisdiction exists and where proper service has been made. 28 U.S.C. § 1330(b). Because the Ninth Circuit determined that the requirements for subject-matter jurisdiction under 28 U.S.C. § 1605(a)(3) had been met, and there was proper service of process, the Panel therefore concluded that statutory personal jurisdiction existed over the Petitioners.

Petitioners assign error to this unremarkable conclusion by asserting that "the Ninth Circuit held that personal jurisdiction over foreign nations may be exercised without regard to due process minimum contacts standards." (Petition, p. 8.) But Petitioners are simply wrong in this suggestion – the Ninth Circuit did no such thing. Immediately after concluding that the *statutory* requirements for personal jurisdiction had been met, the Panel wrote: "We also hold that, if the facts are as Altmann alleges, the assertion of personal jurisdiction over the Republic and the Gallery complies with the Due Process Clause of the Fifth Amendment." (Appendix A, p. 26a.) In fact, the Panel engaged in a traditional "minimum contacts" analysis and concluded that "fair play and substantial justice would not be offended if we maintain jurisdiction over Austria in this case." (Petitioners' Appendix A, p. 29a.)

The question raised in the Petition, namely whether foreign states are entitled to a "minimum contacts" analysis under the Due Process Clause of the Fifth Amendment, is one that was first suggested by this Court in *Republic of Argentina*

v. Weltover, Inc., 504 U.S. 607, 619 (1992). The Ninth Circuit has not found it necessary to answer the question, finding instead, as this Court did in *Weltover*, that in any case the minimum contacts standard was satisfied. Thus, the question is not properly raised in this case and the Petition should be denied on that ground.

It should be noted that, unlike the Ninth Circuit, the District Court in *Altmann I* did squarely confront the due process issue and concluded that foreign states were not entitled to a minimum contacts analysis because foreign states are not "persons" under the Fifth Amendment. In so holding, the District Court fell in line with the few other district courts that had squarely addressed this issue. (Petitioners' Appendix B, 68a-74a.) Subsequently, the Circuit for the District of Columbia became the first circuit court to squarely address the issue and came to the same conclusion. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-100 (D.C. Cir. 2002) (foreign state is not entitled to protection under Due Process Clause and can be sued even without any contacts with the forum). Therefore, not only is there no split of authority, but all of the cases that have answered the question have concluded that foreign states are not entitled to due process protections. A writ of certiorari need not be granted under these circumstances.

Petitioners also quibble with the manner in which the Ninth Circuit applied the traditional minimum contacts analysis. The Panel's jurisdictional analysis is comprehensive and requires no further elaboration, as it is quite obvious that the Petitioners' contacts – selling books and advertising exhibits to United States citizens – are sufficient to confer jurisdiction in a case concerning paintings featured in those books, advertisements and exhibitions. Indeed, it has generally been assumed in the Ninth Circuit that the presence of consulates within the state satisfies the requirements for general jurisdiction over the foreign state. *See Meadows v. Dominican Republic*, 628 F. Supp. 599, 605-608, *aff'd*, 817 F.2d 517, 523 (9th Cir. 1987).

Ignoring this Court's recent holding in *Dole Food* that jurisdiction is determined based on facts existing at the time the case is filed, Petitioners maintain that the Due Process Clause requires that the jurisdictional contacts be present at the time of the acts giving rise to the Complaint. Not surprisingly, there is no authority for this position.[18] Nevertheless, even if one were only allowed to bring claims based on Petitioners' current contacts, this case concerns a continuing violation of law and causes of action sounding in fraud that accrued only in 1999 when Mrs. Altmann discovered that she had been deceived by Austria in the post-war period. Cal. Code Civ. Proc. § 338(d) (fraud action is deemed to have accrued only upon discovery); Cal. Penal Code § 496 (withholding stolen property is actionable); *Naftzger v. American Numismatic Society*, 42 Cal. App. 4th 421, 432-3 (1996) (action for recovery of stolen coins). Therefore, Petitioners' recent contacts with California and the United States are clearly sufficient to establish personal jurisdiction for these timely claims, and provide another basis for rejection of the request for certiorari.

III. THERE IS NO EXHAUSTION OF REMEDIES REQUIREMENT IN THE FSIA

In this case, Mrs. Altmann contends that Petitioners are not immune from suit pursuant to the expropriation exception contained in the second disjunctive clause of 28 U.S.C. § 1605(a)(3). As the Ninth Circuit Panel concluded, all of the provisions of section 1605(a)(3) have been satisfied: (1) the case obviously concerns "rights in property taken in violation of international law;" (2) the property is admittedly "operated" by the Gallery, an agency or instrumentality of Austria; and

18. The lone case relied on by Petitioners, *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987), is obviously distinguishable, even if assumed to be correct for this purpose, as it concerned primarily how to determine a party's citizenship for purposes of establishing diversity jurisdiction, not the presence of sufficient contacts to satisfy due process — an analysis which in any case has few black and white rules. *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978).

(3) the Gallery is "engaged in a commercial activity in the United States."

Notwithstanding Petitioners' failure to persuade either the District Court or the Ninth Circuit Panel with their *forum non conveniens* argument (which they have now dropped), Petitioners seek to revive that failed exhaustion argument by claiming that because Mrs. Altmann has purportedly not exhausted her remedies in Austria this case does not concern "rights in property taken in violation of international law." The argument is without any foundation in the text of the FSIA, and flies in the face of the facts of this case. Apparently it is not enough for Petitioners that their Nazi predecessors imposed confiscatory taxes on Mrs. Altmann's uncle in order to expropriate the paintings at issue. Nor is it enough that Petitioners defrauded Mrs. Altmann's attorney and extorted an agreement by threatening to withhold export permits (a practice Petitioners now concede was illegal and indefensible). Nor is it enough that when Mrs. Altmann attempted to file suit in Austria, Petitioners sought to impose court fees of almost $2 million and refused to waive the statute of limitations.[19] Apparently, Petitioners believe that Mrs. Altmann must prove something more merely to satisfy a jurisdictional statute that requires only that her case concern "rights in property taken in violation of international law." It is hard to imagine what else could be required of her.

If there were another way to resolve this dispute (and avoid three years of jurisdictional motions and appeals), Mrs. Altmann would have tried it. The fact is that she has no other option, and Austria has woefully failed to demonstrate that there is any other avenue open to her. There is simply no possible doubt that this case concerns rights in property taken in violation of international law, and that the statutory requirements of section 1605(a)(3) have been met.

19. Austria has consistently taken the position that the statute of limitations applicable to restitution claims expired years ago. *See United States v. Portrait of Wally*, 2002 U.S. Dist LEXIS 6445, *63-4y (quoting Petitioners' legal expert Dr. Walter Friedrich as concluding that "all claims [for restitution] have expired long ago."

IV. PUBLISHING AND ADVERTISING ARE COMMERCIAL ACTIVITIES

Petitioners seek review by this Court of the question of whether selling books and advertising exhibitions by a museum can constitute a commercial activity. The question is not worthy of consideration by this Court.

"[W]hen a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Weltover*, 504 U.S. at 614. In essence, "a state engages in commercial activity . . . where it exercises only those powers that can be exercised by private citizens, as distinct form those powers peculiar to sovereigns." *Saudia Arabia v. Nelson*, 507 U.S. 349, 360 (1993). "[T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives." *Weltover*, 504 U.S. at 614. The central question is "whether the activity is of a kind in which a private party might engage." *Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987). An activity is commercial if it is of a type that a private person would customarily engage in for profit, without regard to its ultimate purpose. *Gould, Inc. v. Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988).

Museum activities are not peculiar to sovereigns and may be considered commercial activities. *See Boule v. Hutton*, 70 F. Supp. 2d 378 (S.D.N.Y. 1999) ("museum exhibitions relate closely to the commercial market for art"). Indeed, it is increasingly common in both the United States and Austria for private foundations to own and operate museums. Examples include the Getty Museum and the Norton Simon Museum in Los Angeles, as well as the new Leopold Museum in Vienna. Operating a museum is clearly not "peculiar to a sovereign."[20] Furthermore, the marketing of books and other

20. Petitioners misstate the holding of *Aschenbrenner v. Conseil Regional de Haute-Normandie*, 851 F. Supp. 580 (S.D.N.Y. 1994). In *Aschenbrenner*, the Court held that the alleged injury was not sufficiently related to the (Cont'd)

materials related to an exhibition is under any common sense analysis a "commercial activity." As Webster's Dictionary puts it, "commercial" is in the first instance broadly defined as "occupied with or engaged in commerce or work intended for commerce." *Webster's Ninth New Collegiate Dictionary*, p. 264 (Merriam-Webster Spingfield, Mass. 1988).

Petitioners continue to assert that the Gallery's commercial activities in the United States are not sufficient to confer jurisdiction over Petitioners under section 1605(a)(3). However, they fail to cite a single case concerning the application of 1605(a)(3) to support their theory, instead relying solely on cases interpreting the far different requirements of the commercial activity exception set forth in 1605(a)(2). In this regard, Petitioners ignore the Ninth Circuit's prior holding in *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993), in which the Ninth Circuit found on far more limited facts (acceptance of American credit cards in a foreign hotel) that jurisdiction existed under the same expropriation clause of the FSIA.

To confer jurisdiction, section 1605(a)(3) requires only one, even unrelated, commercial activity in the United States by the agency or instrumentality of the foreign state owning or operating the expropriated property at issue. *Gabay v. Mostazafan Foundation of Iran*, 151 F.R.D. 250, 255 (S.D.N.Y. 1993). Here, the commercial activities of the Gallery in the United States are substantial and ongoing and are actually closely related to the Complaint. These activities include selling books and advertising and selling tickets to museum exhibitions using and exploiting the very paintings at issue in this case. The fact that these are also "cultural" activities does

(Cont'd)

commercial activity engaged in by the museum (selling books) so as to permit application of the commercial activities exception of the FSIA. *See* 28 U.S.C. § 1605(a)(2). Unlike the commercial activities exception, however, 1605(a)(3) does not require the cause of action to be in any way related to the commercial activity engaged in by the agency or instrumentality of the foreign state.

not make them any less commercial, as that term is broadly defined in the FSIA in section 1603(d).

By any reasonable measure, based on the record in this case, the Gallery is engaged in commercial activity in the United States. First, it has authored, edited and published a book – "Klimt's Women" – in the United States with Yale University Press. The book includes several of the pictures at issue in this case. An English language guide book, edited and published by the Gallery and featuring on the cover one of the looted pictures of Mrs. Altmann's aunt, has also been available for purchase in the United States. Book selling is a commercial activity, and one that is not "peculiar to a sovereign."

Second, the Gallery advertises its exhibitions in the United States. It attracts American tourists and accepts funds, including American credit card payments, from those tourists when they visit the museum in Vienna. In *Siderman*, the Ninth Circuit considered such activity to be commercial activity in the United States. The Ninth Circuit held that the expropriation exception (and commercial activity exception) applied in the case of an Argentinian hotel that was taken from the plaintiffs where Argentina and the hotel benefited from advertising in the United States, entertained American tourists and accepted their credit cards. *Siderman*, 965 F.2d at 709-10, 712. The Ninth Circuit concluded that the commercial activities Argentina was conducting through the hotel were sufficient to support the exercise of jurisdiction over both the defendants under the expropriation clause of section 1605(a)(3). *Id.* The current case is indistinguishable from *Siderman*, and indeed presents even stronger facts because of the Gallery's overt commercial activity in the United States.

In this case, jurisdiction is sought under the expropriation clause, section 1605(a)(3). That clause requires *no connection* between the expropriation and the commercial activity of the agency or instrumentality of the foreign state (otherwise it would simply be a redundant subset of the commercial activity exception). *See Gabay*, 151 F.R.D. at 255 (under second portion

of § 1605(a)(3), commercial activity "need not have anything to do with the substance of the lawsuit"). Rather, the exception applies when property taken in violation of international law is owned or operated by an agency or instrumentality that is also engaged in a (possibly unconnected) commercial activity in the United States. *Id.* Nowhere in section 1605(a)(3) or in any case interpreting the second disjunctive clause is it stated that the commercial activity must in any way be connected to the property taken in violation of international law.

In any case, the commercial activities of the Gallery in the United States *are* clearly and unequivocally connected with the expropriation of the paintings at issue in this case. The expropriated paintings are used to advertise exhibitions at the Gallery. Further, the Gallery has published in conjunction with Yale University Press in the United States a catalogue of its most recent exhibition, featuring several of the expropriated paintings. The Gallery is deriving income in the United States from its unlawful retention of the paintings sought in this action.[21] Therefore, the last clause of section 1605(a)(3) is clearly satisfied because the Gallery is engaged in a commercial activity in the United States. *Siderman*, 965 F.2d at 709-10, 712; *Los Angeles News Serv. v. Conus Communs. Co. Ltd. Pshp.*, 969 F. Supp. 579 (C.D. Cal. 1997) (Canadian TV broadcast viewable in U.S. was commercial activity in the U.S. sufficient for jurisdiction under the FSIA).

V. THE VENUE QUESTION WAS CORRECTLY DECIDED AND IS NOT APPROPRIATE FOR REVIEW

Lastly, there is neither a split of authority, nor are there any other factors justifying review of the venue question in this case. In cases against a foreign state or its agencies or instrumentalities, venue is governed by 28 U.S.C. § 1391(f). "Venue is not a jurisdictional prerequisite and its presence or absence does not affect a court's authority to adjudicate." *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d

21. Indeed, each time the Gallery accepts payment with a credit card issued by a U.S. bank it is engaging in a commercial activity in the United States. *Siderman*, 965 F.2d at 709-10, 712.

1344, 1349 (11th Cir. 1982). Moreover, the decision whether to grant a venue motion is also reviewed under an abuse of discretion standard. *Costlow v. Weeks*, 790 F.2d 1486, 1488 (9th Cir. 1986). The district court's discretion extends beyond the determination of facts to the weighing of those facts, *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 227 (3d Cir. 2000), and there is not a shred of evidence in the record below to suggest that this discretion was abused.

The Ninth Circuit concluded that venue was appropriate over the Gallery under section 1391(f)(3), because the Gallery is engaged in a commercial activity in the Central District of California. Given the multiple bases for this conclusion, this was not an abuse of discretion, and absolutely no evidence was presented by Petitioners to dispute this finding. Section 1391(f)(3) provides for venue in an action against an agency or instrumentality in any judicial district in which the agency or instrumentality is doing business. As discussed above, the Gallery is obviously engaged in business in the Central District of California by, among other things, selling books and by advertising to and receiving visitors to its museum from within the geographical boundaries of the federal district, whose residents make purchases at the museum with credit cards issued by banks within the district. *Gray v. St. Martin's Press, Inc.*, 929 F. Supp. 40, 45 (D.N.H. 1996) (author could be sued for defamation in state where her book was sold by publisher).

Further, the Ninth Circuit properly held that if venue was proper as to the Gallery, then it was proper as to Austria. The Ninth Circuit correctly held that where venue is appropriate for one defendant, it is also appropriate for the related co-defendants. *See Southmark Prime Plus, L.P. v. Falzone*, 768 F. Supp. 487, 489 (D. Del. 1991) (applying co-conspirator venue theory in RICO case). Section 1391(f) applies in the alternative and does not require two separate trials in two separate districts against the foreign state and its agency and instrumentality.

Based on the authorities cited, it is self-evident that the venue question was properly decided by the Ninth Circuit and in any case the question is not sufficiently weighty to justify review by this Court.

CONCLUSION

For all the foregoing reasons, Mrs. Altmann respectfully requests that the Supreme Court deny review of this matter and allow her finally to proceed with her claims on their merits so that they can be resolved in her lifetime.

Respectfully submitted,

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APPENDIX

APPENDIX A – EXCERPT FROM TEXT OF JANUARY 17, 2001 EXCHANGE OF NOTES CONCERNING THE ESTABLISHMENT OF THE GENERAL SETTLEMENT FUND

Exchange of Notes between the Government of the United States of America and the Austrian Federal Government

The Department of State refers the Embassy of Austria to the Preamble and to Articles 1(4), 2(2), 2(3), and 3(3) of the Agreement between the Government of the United States of America and the Austrian Federal Government concerning the Austrian Fund "Reconciliation, Peace and Cooperation" (Reconciliation Fund) ("Agreement"), signed October 24, 2000.

Noting the correspondence between the President of the United States and the Federal President of the Republic of Austria, in connection with the Agreement,

Recalling the relevant provisions of the 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria, the 1959 Exchange of Notes Constituting an Agreement between the United States of America and Austria relating to the Settlement of Certain Claims under Article 26 of the Austrian State Treaty of May 15, 1955, as well as the contents of the letter dated December 19, 1961 from Dr. Nahum Goldman, the Chairman of the Committee for Jewish Claims on Austria, to Dr. Josef Klaus, the Austrian Federal Minister of Finance.

The United States welcomes the commitment of the Austrian Federal Government to provide immediate compensation for survivors pursuant to Annex A, paragraph 1, to propose legislation to the Austrian Parliament by April 30, 2001 to establish a General Settlement Fund ("GSF") (providing for a Claims Committee and an Arbitration Panel) in conformity with the principles set forth in Annex A, paragraphs 2 and 3, and to seek changes in the laws that address social benefits for victims of National Socialism in conformity with Annex A, paragraph 4.

Appendix A

The United States further welcomes the commitment of the Austrian Federal Government to make good faith progress on the implementation of the additional measures for victims of National Socialism set forth in Annex A, paragraphs 5-9.

The United States considers the provision of immediate compensation for survivors pursuant to Annex A, paragraph 1, the General Settlement Fund, established in conformity with the principles set forth in Annex A, paragraphs 2 and 3, the changes in the laws that address social benefits for victims of National Socialism in conformity with Annex A, paragraph 4, and the making of good faith progress on the implementation of the additional measures for victims of National Socialism set forth in Annex A, paragraphs 5-9, to constitute a "suitable potential remedy", as understood by Articles 2(2) and 3(3) of the Agreement, for all claims that have been or may be asserted against Austria and/or Austrian companies, as defined in Annex B, arising out of or related to the National Socialist era or World War II, excluding claims covered by the Reconciliation Fund, in respect of which the Agreement shall continue to govern, and further excluding *in rem* claims for works of art and, subject to the provisions of Annex A, paragraph 10, claims for *in rem* restitution of property owned by Austrian provinces and municipalities.

Upon fulfillment of the commitments of the Austrian Federal Government referred to above, the United States will support all-embracing and enduring legal peace for the above-mentioned claims, as provided for in the Agreement and herein.

The United States agrees that this exchange of notes and the establishment of the GSF shall not affect unilateral decisions or bilateral or multilateral agreements that dealt with the consequences of the National Socialist era or World War II.

Appendix A

Austria's note and this affirmative reply shall constitute an agreement between the United States and Austria, which shall enter into force when Austria notifies the United States, by diplomatic note, that it has implemented its commitments referred to above .

The United States agrees that Annexes A and B shall be integral parts of this agreement.

Annex A

10. *Legal Closure*: The establishment of the GSF in conformity with the principles set forth in *supra* paragraphs 2 and 3, the passage of the legislation necessary to provide victims of National Socialism with the additional benefits referred to *supra* in paragraph 4, and the good faith progress in the implementation of the commitments referred to *supra* in paragraphs 5 to 9, confirmed by a diplomatic note from Austria to the United States, will lead to the dismissal with prejudice of all claims arising out of or related to the National Socialist era or World War II that have been or may be asserted against Austria and/or Austrian companies, excluding claims covered by the Reconciliation Fund, in respect of which the Agreement shall continue to govern, and further excluding *in rem* claims for works of art, by the plaintiffs' attorneys who have signed the Joint Statement and to the United States taking appropriate steps in accordance with Articles 2(2), 2(3) and 3(3) of the Agreement between the Government of the United States of America and the Austrian Federal Government concerning the Austrian Fund "Reconciliation, Peace and Cooperation" (Reconciliation Fund) to assist Austria and Austrian companies in achieving legal closure for all such claims. The term "works of art" is understood to include tangible movable cultural or religious objects.

APPENDIX B – JANUARY 17, 2001 LETTER FROM HANS WINKLER, LEGAL ADVISER, AUSTRIAN FEDERAL MINISTRY FOR FOREIGN AFFAIRS, TO STUART E. EIZENSTAT, DEPUTY SECRETARY OF THE TREASURY

January 17, 2001

Stuart E. Eizenstat
Deputy Secretary of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, DC 20220

Dear Deputy Secretary Eizenstat,

This is to confirm that the Exchange of Notes concerning the establishment of the General Settlement Fund, the Joint Statement of January 17, 2001, and any provisions concerning "legal closure" therein, shall not affect or pertain to the matter of *Maria Altman[n] v. Republic of Austria et al.*, currently pending before the United States District Court for the Southern [sic] District of California, because it is a matter of art restitution under the Austrian law. The United States Government has indicated that it will not file a Statement of Interest in the above matter.

Sincerely,

Hans Winkler
Legal Adviser
Austrian Federal Ministry for Foreign Affairs

APPENDIX C – 1955 STATE TREATY FOR THE RE-ESTABLISHMENT OF AN INDEPENDENT AND DEMOCRATIC AUSTRIA ("STRIDA"), ARTICLE 26

1955 State Treaty For The Re-Establishment Of An Independent And Democratic Austria

Article 26

Property, Rights and Interests of Minority Groups in Austria

1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13th March, 1938, been subject to forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories. Where return or restoration is impossible, compensation shall be granted for losses incurred by reason of such measures to the same extent as is, or may be, given to Austrian nationals generally in respect of war damage.

APPENDIX D – HOLOCAUST VICTIMS REDRESS ACT, PUB. L. NO. 105-158, 112 STAT. 18 (1998)

TITLE II – WORKS OF ART SEC. 201. FINDINGS.

Congress finds as follows:

(1) Established pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art.

(2) In the years since World War II, international sanctions against confiscation of works of art have been amplified through such conventions as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which forbids the illegal export of art work and calls for its earliest possible restitution to its rightful owner.

(3) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.

(4) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

(5) Hence, the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust.

(6) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.

SEC. 202. SENSE OF THE CONGRESS REGARDING RESTITUTION OF PRIVATE PROPERTY, SUCH AS WORKS OF ART.

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Supreme Court, U.S.
FILED
AUG 8 _ 2003
OFFICE OF THE CLERK

No. 03-13

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

Respondent Maria V. Altmann's assertion that "[t]here is nothing here which requires this Court's attention," (Opp. 4), grossly trivializes the conflicts created by the Ninth Circuit's disregard for the sovereign immunity of a friendly foreign state and its national museum. Altmann admits that Austria has been singled out by the Ninth Circuit as the *only* foreign state in which United States *in personam* jurisdiction has been affirmed for events that occurred before 1952. Altmann's explanation for this dubious distinction, that the Ninth Circuit's decision is unique on its facts and therefore needs no review by this Court, is wrong.

In holding that some foreign states, including Austria, did not have settled expectations of absolute immunity before 1952, either because they adopted the restrictive theory of sovereign immunity or by speculating whether the State Department might have departed from its policy of absolute immunity to all foreign states before 1952, the Ninth Circuit is in direct conflict with the *legal* holdings of three other circuits, as well as with the Executive Branch, that *all* foreign states had a reasonable expectation of sovereign immunity before 1952. The Ninth Circuit also ignored settled law that, even under the restrictive theory, the United States and Austria recognized absolute immunity for foreign expropriations.

Additionally, the authority relied upon by Altmann concerning due process confirms that the Ninth Circuit, in holding that minimum contacts are not required under the FSIA, conflicts with other courts and congressional intent. Moreover, Altmann's argument that there is a continuing violation of international law under the expropriation section ignores settled precedent and contradicts the facts alleged in her Complaint. Altmann also misstates the impact of the Ninth Circuit's ruling that she failed to exhaust her legal remedies in Austria.

Claims against foreign states arising before, during and immediately after World War II are proliferating in United States courts. The Ninth Circuit's holdings already

have been addressed by two other circuits considering such claims and caused reconsideration of a prior decision by at least one district court in California. By granting the petition for review, this Court will provide a needed basis for the uniform exercise of United States jurisdiction in these and other cases considering claims which arose before 1952.

ARGUMENT

I. There Is A Conflict Among The Circuits.

The Ninth Circuit's holdings directly conflict with the Eleventh, Second and District of Columbia Circuits. The conflict created by the Ninth Circuit is of *a matter of law*, and not a discrete application of unique facts, as Altmann alleges.[1]

Without supporting authority, the Ninth Circuit created an exception to the rule of absolute immunity never before recognized by a United States court, before or after 1952: that foreign states had no expectation of absolute immunity in the United States before 1952 if, in their own courts, they applied the restrictive theory of sovereign immunity to other countries. Pet. App. A 19a-21a. This reciprocity exception is not only unfounded, it is fatally flawed. The Ninth Circuit acknowledged that the restrictive theory as adopted by Austria (and the United States) "recognizes sovereign immunity 'with regard to sovereign or public acts . . . of a state, but not with respect to private acts.'" Pet. App. A 19a. Expropriations under the restrictive theory were considered uniquely public acts of a sovereign. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Pet. 12-13. Hence, Austria's alleged adoption of the restrictive theory could not have altered its settled expectation of immunity in this country for a pre-1952 expropriation, as it would have extended the same exception to the United States.

1. Professing at first that the facts "are not very material to the legal issues" (Opp. 1), Altmann then devotes a substantial portion of her Opposition to her version of them. Petitioners will substantiate their statement of the facts in their Brief to this Court in the event review is granted.

Notwithstanding what theory of sovereign immunity a foreign state may have adopted before 1952, the Ninth Circuit further held that it was appropriate for a federal court today to speculate as to whether the State Department might have departed from its pre-1952 practice of recommending absolute immunity, despite the Executive Branch's contrary position in its *amicus curiae* brief. Pet. App. A 16a. Remarkably, Altmann acknowledges that "[i]t seems pointless to speculate what a hypothetical President Truman administration might have done if confronted with this case in the immediate post-war era." Opp. 12 n.11. She nevertheless urges that the Ninth Circuit's decision in this case, which is predicated on precisely such pointless speculation, is free of error and should not be disturbed by this Court. Opp. 8.[2]

As explained in the petition, the Ninth Circuit compounded its legal error by misstating the United States' historical relationship with Austria before, during and after World War II and, hence, Austria's settled expectations of absolute immunity before 1952. Pet. 15-16. The United States agrees that the State Department would not have disturbed Austria's settled expectation of absolute immunity before 1952. Pet. App. F 114a-115a. Importantly, there is no reported case in the United States known to petitioners or the Executive Branch in which *in personam* jurisdiction was asserted against a foreign state before 1952. Pet. App. F 110a.

In *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), the Eleventh Circuit did not speculate what the State Department *might* have recommended *vis-a-vis* China between 1911 and 1951. Nor did the Eleventh Circuit attempt to exclude any category of foreign states from the pre-1952 rule of absolute immunity, as the Ninth Circuit did with respect to foreign states that had adopted

2. The so-called "Bernstein letter" relied upon by Altmann and the Ninth Circuit is irrelevant. Opp. 12. The 1949 letter responded to an inquiry by the Second Circuit as to whether it could pass on the validity of a Nazi confiscation in a claim against a Dutch corporation. Nothing in the letter suggests that it was intended to create an exception to the pre-1952 absolute immunity of foreign states. Pet. App. F 112a.

the restrictive theory of sovereign immunity before 1952. Instead, the Court presumed that China "relied on the . . . extant and almost universal doctrine of absolute sovereign immunity" in effect before 1952. *Id.* Similarly, the Second Circuit in *Carl Marx & Co. v. USSR*, 841 F.2d 26 (2d Cir. 1988), without resort to speculation concerning the specific expectations of the Soviet Union in 1918, held that "only after 1952 was it reasonable for a sovereign to anticipate being sued in the United States." *Id.* at 27.

The District of Columbia Circuit's recent holding in *Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003) is in express accord with the Second and Eleventh Circuits. *Joo*, 332 F.3d at 684. The holding in *Joo* is clear:

> [A]pplication of the commercial activity exception to events that occurred prior to 1952 would impose new obligations upon, come without fair notice to, and *upset the settled expectations of, foreign sovereigns*. . . . Theretofore *a foreign sovereign justifiably would have expected any suit in a court in the United States — whether based upon a public or a commercial act — to be dismissed unless the foreign sovereign consented to the suit.*

Id. at 683 (emphasis added).[3]

The conflict among the circuits can only be resolved by this Court granting the petition for writ of certiorari.

II. Altmann's Defense Of The Ninth Circuit's Decision Is Unfounded.

The Ninth Circuit held that Austria, which was a non-belligerent nation occupied by Nazi Germany during World War II, had no expectation of immunity before 1952, notwithstanding that other courts have confirmed that Imperial Japan and Nazi Germany had settled expectations of absolute immunity for their conduct during the war. *Joo, supra* (holding that Japan had a settled expectation of absolute immunity for the war-crimes of rape, torture and

3. Altmann incorrectly asserts that the District of Columbia Circuit in *Joo* "studiously avoided a conflict" with the Ninth Circuit in this case. Opp. 14. To the contrary, *Joo* expressly *refused* to be bound by the Ninth Circuit's decision. *Joo*, 332 F.3d at 684.

murder); *Djordjevich v. Bundesminister Der Finanzen, Federal Republic of Germany*, 827 F. Supp. 814 (D.D.C. 1993), *aff.*, 124 F.3d 1309 (1997) (unpublished) (recognizing Germany's settled expectation of absolute immunity in United States courts for Nazi atrocities). Altmann's attempts to justify the inherent conflict between the Ninth Circuit and these other decisions cannot be reconciled with settled precedent.

A. Altmann Ignores Settled Precedent On Sovereign Immunity.

According to Altmann, Austria had no expectation of sovereign immunity in the United States before 1952 because Austria provides a forum for expropriation claims in its own courts. Opp. 9. Altmann's argument not only conflicts with her later assertion that United States jurisdiction is proper because Austria allegedly does *not* provide a legal remedy for her in Austria, (Opp. 23), it is contrary to established precedent. The "submission of a foreign sovereign to its own courts . . . does not by itself evidence an intent by the foreign sovereign to waive its immunity from suit in the United States." *Corzo v. Banco Central De Reserva Del Peru*, 243 F.3d 519, 523-524 (9th Cir. 2001). *Accord, General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1386 (8th Cir. 1993); *Frolova v. U.S.S.R.*, 761 F.2d 370, 377 (7th Cir. 1985).[4]

The argument is also facially absurd. Altmann's reasoning would result in greater immunity for governments that make no effort at reparations for pre-1952 claims than foreign states such as Austria, which has

4. Altmann's argument also is predicated on two misassumptions that (1) the FSIA is a "purely" jurisdictional statute; and (2) the FSIA can never have an impermissible retroactive effect because it merely changes the forum of her claim from Austria to the United States. Opp. at 8. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496-497 (1983) (the FSIA "does not merely concern access to the federal courts [but also] codifies the standards governing sovereign immunity law *as an aspect of substantive federal law*") (emphasis added); *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 951 (1997) ("a statute [that speaks to the substantive rights of the parties], even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other").

enacted numerous restitution statutes since World War II (including the 1998 art restitution statute upon which Altmann relies), and has entered into international agreements to facilitate such claims.

B. Altmann Wrongly Asserts A Continuing Violation Of International Law.

Altmann's argument (Opp. 22) that this case involves a continuing violation of international law because Austria has retained possession of the paintings since 1948 is baseless. Altmann's claims against Austria explicitly arise from its purported expropriation in 1948, when she alleges Austria acquired the paintings by withholding export permits. Altmann's theory also contradicts settled authority that the conduct that triggers the expropriation exception is the *taking* and not the possession of property. *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987) ("[section] 1605(a)(3) applies to 'claims to compensation for taking'") (quoting Rest. of For. Rel. Law of the U. S. (Revised), § 455, comment c (1987)).[5]

Altmann's assertion that a subsequent expropriation occurred in 1999 by some Austrian officials allegedly interfering with the Advisory Board's decision also fails. Opp. 22. The Complaint confirms that there was no "taking" of property in 1999. Also, the Ninth Circuit confirmed that, to fall within the expropriation exception, an unlawful taking in violation of international law requires an act of discrimination. Pet. App. A 23a. The Complaint does not allege, and there is no basis to the claim, that even if Austria had acted improperly in 1999 it was discriminating against aliens in doing so. Since 1998, Austria has returned hundreds of millions of dollars of artwork in its museums to other persons who are not Austrian citizens (such as other Jewish Holocaust

5. Altmann's reliance on *Dole Food Co. v. Patrickson*, __ U.S. __, 123 S. Ct. 1655 (2003) is also misplaced. Opp. 8 n.5. Neither the holding of *Dole* nor any discussion therein concerned whether the retroactive application of the FSIA disturbs the settled expectations of a sovereign state for events that pre-date 1952.

survivors) – including approximately one million dollars of property to Altmann and her family.

The Ninth Circuit flatly rejected Altmann's argument that she exhausted her remedies in Austria.[6] However, the Ninth Circuit failed to recognize that there is no violation of international law absent pursuit of available remedies. Pet. App. A 24a, 32a. Whether its holding is correct is an important issue warranting review.

C. Altmann Unduly Trivializes The Impact Of The Ninth Circuit's Decision.

The Ninth Circuit's decision is not the benign "fact-specific" case that Altmann claims it is. As a published opinion, the decision may be cited as precedent, and it has been. *See Cruz v. United States*, 2003 U.S. LEXIS 10948, *3 (N.D. Cal. 2003) ("*Cruz II*") (holding that Mexico had a settled expectation of immunity before 1952 because, "[a]s the Ninth Circuit recognized in Altmann, 'Latin American nations did not accept the restrictive approach to immunity [until] well into the 1980s'").[7]

Left undisturbed, the Ninth Circuit's decision gives any federal court authority to reach its own "historical" conclusions concerning the settled expectations of particular countries before 1952. Contradictory holdings of what the State Department might have intended with

6. Altmann acknowledges that she abandoned her opportunity to have Austria's independent judiciary review the misconduct she emphatically attributes to the Republic. Altmann has never alleged, nor can she, that Austria's courts have treated her unfairly, or are complicit in the alleged conspiracy within the Republic to deny her ownership of the paintings. Indeed, Altmann admits that Austrian courts substantially reduced her statutory court fees (which are common in European legal systems), notwithstanding her claim that the Republic asked them to be increased.

7. In *Cruz II* the court reconsidered in light of *Altmann* its prior holding that Mexico, like *all* foreign states, had a settled expectation of absolute immunity before 1952. *Cruz v. United States*, 219 F. Supp. 2d 1027 (N.D. Cal. 2002) ("*Cruz I*"). As in *Jackson*, *Carl Marx* and *Joo*, no separate analysis of Mexico's particular expectations was considered in *Cruz I* because of the State Department's rule of "absolute sovereign immunity" before 1952. *Id.* at 1033. In *Cruz II*, however, the district court was constrained to conform its analysis to the Ninth Circuit's subsequent decision in this case. *Cruz II* at *3.

regard to the immunity of specific countries are inevitable. This is not an abstract concern. In three pending cases, one of which is against Austria, the Second Circuit has remanded to the district courts to try to ascertain what the State Department's policies were for French railroads, Poland and Austria before 1952. *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 332 F.3d 173 (2d Cir. 2003); *Whiteman v. Austria*, 02-9361, 02-3087 (2d Cir. 2003); *Garb v. Republic of Poland*, 02-7844 (2d Cir. 2003). Nevertheless, in *Abrams*, the court expressed concern that the general history of sovereign immunity was insufficient to support such a factual determination. *Abrams*, at 176, 186-188. And, in *Whiteman* and *Garb*, the court noted that "there exists the possibility that specific evidence of the Department of State's position with respect to a particular country during a given period of time . . . may not exist." App. 7a. Obviously, different conclusions might be reached by different circuits regarding the expectations of even a single country.[8]

The Ninth Circuit's decision also has serious implications for the foreign policy of the United States. Although Altmann attempts to soft-peddle the United States' *amicus curiae* brief as only an expression of legal opinion, (Opp. 16), the United States advised the Ninth Circuit that its conclusions were "based upon an erroneous assessment . . . of the contemporaneous policy of the Executive Branch." Pet. App. F 103a. The United States further criticized the Ninth Circuit for infringing on the political branches' responsibility for determining which foreign states are friendly to the United States. Pet. App. F 108a. It also pointed out that the Ninth Circuit's decision disturbs the "extensive diplomatic efforts" leading to the post-war reparations treaties and agreements

8. The *Whiteman/Garb* Summary Order is not published. App. 1a. It is not cited here as precedent, but merely to inform this Court of the fact that district courts since *Altmann* are asked to make these speculative inquiries. Unlike the Second Circuit, the Ninth Circuit here drew its own conclusions without remanding to the district court, based in part on documents that were not in the record on appeal.

negotiated with Germany and Austria. Pet. App. F 114a-155a. *See also American Insurance Association v. Garamendi*, __ U.S. __, 123 S. Ct. 2374, 2377 (2003).

If there exists any doubt as to the Executive Branch's position concerning the legal and policy issues affected by the Ninth Circuit's decision, petitioners respectfully request the Court to invite the Solicitor General to file a brief in this case expressing the views of the United States.

Moreover, the diplomatic ramifications of a United States court holding that Austria, a nation friendly to the United States, must appear in a United States court to answer charges that it is actively advancing Nazi war-crimes in connection with a matter of extreme domestic importance to Austria, cannot be understated.[9]

III. Congress Intended That Foreign States Be Accorded Due Process Protection.

Altmann's assertion (Opp. 20) that the Ninth Circuit's alternative minimum contacts analysis, with all of its flaws, obviates the need for Supreme Court review, is misplaced.

9. Altmann misstates the import of the letter from Mr. Winkler of the Austrian Federal Ministry for Foreign Affairs. Opp. 17, & App. B. The letter merely restates what is apparent from the Joint Statement of January 17, 2001 to which it refers: that *in rem* claims for art restitution are not covered by the General Settlement Fund. The letter makes it clear that this case "is a matter of art restitution under the [*sic*] Austrian law." Altmann also misleadingly quotes only a portion of petitioners' submission to the district court concerning the Joint Statement. Opp. 17 n.14. Altmann omitted the following qualification, which was the result of diplomatic discussions between the United States and Austria after the filing of the motion to dismiss:

> (3) Austria has not waived any rights to challenge the subject matter or personal jurisdiction of this Court or any other defenses raised in the Motion [to Dismiss] or otherwise available in this action, including but not limited to sovereign immunity, the act of state doctrine on other grounds, forum non conveniens, improper venue and non-joinder of parties.

Altmann does not dispute this language. She merely ignores it when it does not serve her purposes.

The District of Columbia's holding in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), relied upon by Altmann in her Opposition (at 21) confirms the need for review. *Price* concerned the assertion of personal jurisdiction under section 1605(a)(7) of the FSIA, which was enacted as part of the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Price*, at 294 F.3d 88. *Price* recognized that, unlike the newer AEDPA sections, Congress intended that application of the original FSIA provisions, which include the expropriation exception, comply with minimum contacts standards. *Id.* at 90.[10]

Price confirms that foreign states are entitled to due process protection under the original FSIA provisions, including the expropriation clause, not because they are persons under the Fifth Amendment, but because Congress intended such protection when it enacted the FSIA in 1976.[11]

CONCLUSION

For the reasons set forth in the petition for writ of certiorari and in this reply, petitioners respectfully request that review by this Court be granted.

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10. Moreover, while holding that foreign states are not "persons" under the Due Process Clause of the Fifth Amendment, the Court in *Price* nevertheless acknowledged that "the Supreme Court . . . ha[s] expressly indicated that the constitutional issue remains an open one." *Id.*, at 95-100, citing, as petitioners did, to *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992).

11. Altmann makes no serious effort to refute the clear precedent that "doing business" for venue purposes requires significantly more than the one commercial act cited by the lower courts. Opp. 27. Moreover, Altmann's argument that venue is proper against all defendants if proper against one of them is simply wrong. Opp. 28. The ruling in *Southmark Prime Plus, L.P. v. Falzone*, 768 F. Supp. 487, 489 (D. De. 1991), upon which Altmann relies, depended on the particular provisions of the RICO statute, 18 U.S.C. § 1965(b), which expressly authorized venue under such circumstances. There is no such authority under 28 U.S.C. § 1391(f) for venue in this case to be in any district other than the District of Columbia.

Respectfully submitted,

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APPENDIX

APPENDIX – SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED AUGUST 6, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 6th day of August, two thousand and three.

PRESENT:

AMALYA L. KEARSE,
JOSÉ A. CABRANES,
CHESTER J. STRAUB,
Circuit Judges.

No. 02-7844
02-9361

THEO GARB, BELLA JUNGEWIRTH, SAM LEFKOWITZ, PETER KOPPENHEIM, JUDAH WELLER, CHANA LEWKOWICZ, SAMUEL GOLDIN, KARL DIAMOND, HALA SOBOL, SAUL KLAUSNER and GOLDIE KNOBEL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

Appendix

REPUBLIC OF POLAND, MINISTRY OF THE TREASURY OF POLAND (MINISTERSTWO SKARBU PANSTWA), JOHN DOES #1-100 and MINISTRY OF THE TREASURY OF POLAND (MINISTERSTWO SKARBU PANSTWA),

Defendants-Appellees.

No. 02-9361

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTA LEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZ URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FÜRST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPP-BAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL, and ROBERT KLEIN,

Plaintiffs-Appellees,

v.

REPUBLIC OF AUSTRIA, DOROTHEUM GMBH, a/k/a DOROTHEUM AUKTIONS-, VERSATZ-, UND BANKGESELLSCHAFT MBH, ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Defendants-Appellants,

VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, BÖHLER UDDEHOLM AG, ÖMV AG, RAIFFEISEN ZENTRAL ÖSTERREICHISCHE BANK A.G., STEYR-DAIMLER-PUCH AG, a/k/a STEYR DAIMLER-PUCH SPEZIALFAHRZEUG AG a/k/a STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG, AUSTRIAN DOE CORPORATIONS 1 to 100, ERSTE BANK DER OESTERREICHISCHEN SPARKASSEN AG,

Defendants.

Appendix

No. 02-3087

In re REPUBLIC OF AUSTRIA, DOROTHEUM GMBH & Co KG, and ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Petitioners.

DORIT WHITEMAN, ALFONS SPERBER, HERTHA FIELD, ALICE JAY SUSSMAN, ANITTA LEA, ROBERT WEINBERGER, RUDOLF AUSPITZ, MAX URI, FRITZ URI, LEO GRANIERER, SOPHIE HABER, GERTRUDE FIALA, HARRIET MEHL-ROTTENBERG, GERDA FELDSBERG, ALEXANDER-SANDOR FÜRST, ERNST B. RIVIN-RIESENFELD, LIZZY RAPP-BAUER, RUTH DAVIDOVITS, DOROTHEA WINKLER, ERICH RICHARD FINSCHES, MICHAEL SCHWARZ, HEINZ BISCHITZ, LOTTIE MECZES-SCHWENK, LUGE SVOBODA, FRIEDERIKE HERZL, and ROBERT KLEIN,

Plaintiffs-Respondents,

v.

REPUBLIC OF AUSTRIA, DOROTHEUM GMBH, a/k/a DOROTHEUM AUKTIONS-, VERSATZ-, UND BANKGESELLSCHAFT MBH, ÖSTERREICHISCHE INDUSTRIEHOLDING AG,

Defendants-Petitioners,

VOEST-ALPINE STAHL AG, VA TECHNOLOGIE AG, BÖHLER UDDEHOLM AG, ÖMV AG, RAIFFEISEN ZENTRAL ÖSTERREICHISCHE BANK A.G., STEYR-DAIMLER-PUCH AG, a/k/a STEYR DAIMLER-PUCH SPEZIALFAHRZEUG AG, a/k/a STEYR DAIMLER PUCH FAHRZEUG TECHNIK AG, UNIQA VERSICHERUNGEN AG, AUSTRIAN DOE CORPORATIONS 1 TO 100, ERSTE BANK DER OESTERREICHISCHEN SPARKASSEN AG,

Defendants.

Consolidation of (1) appeal in *Garb v. Poland*, No. 02-7844, from June 26, 2002 judgment entered by the United States District Court for the Eastern District of New York (Edward R. Korman, *Chief Judge) dismissing* plaintiffs' claims; (2) appeal in *Whiteman v. Austria*, No. 02-9361, from a discovery order of the United States District Court for the Southern District of New York (Shirley Wohl Kram, *Judge)*; and (3) No. 02-3087, a petition for writ of mandamus filed by several defendants in *Whiteman v. Austria* to compel the United States District Court for the Southern District of New York (Shirley Wohl Kram, *Judge)* to decide a motion to dismiss. The consolidated appeals present the questions, *inter alia*, whether and on what terms the federal courts have jurisdiction under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-1611, to adjudicate the liability of foreign governments for actions preceding the FSIA's enactment.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment and order of the District Courts be and hereby are VACATED AND REMANDED, and the petition for writ of mandamus be and hereby is DENIED.

Plaintiffs in these consolidated matters are Jews (and their heirs and successors) who seek relief from abuses and deprivations allegedly effected by defendant states and their instrumentalities during and subsequent to World War II.

Plaintiffs in *Garb v. Poland*, No. 02-7844, are Jewish former citizens of Poland who claim that the Polish government wrongfully confiscated their land following World War II pursuant to an official post-war policy encouraging the migration of surviving Jews through the dispossession of Jewish property. Plaintiffs argue that their claims are authorized by two exceptions to sovereign immunity under the FSIA: the "commercial activity" exception, 28 U.S.C. § 1605(a)(2), and the "takings" exception, 28 U.S.C. § 1605(a)(3). The District Court granted

defendants' motion to dismiss with respect to both claimed exceptions. *See Garb v. Poland*, 207 F. Supp. 2d 16, 33 (E.D.N.Y. 2002). Plaintiffs appeal the judgment of the District Court.

In *Whiteman v. Austria*, Nos. 02-9361 and 02-3087, plaintiffs are present and former Jewish citizens and residents of Austria who lost property under the Nazi regime in Austria from 1938 until 1945. They allege the extensive involvement of defendants-appellants in the confiscation and continued ownership of specific property, including works of art recently offered for auction in the United States. Plaintiffs argue that their claims are authorized under exceptions to the FSIA for "commercial activity," 28 U.S.C. § 1605(a)(2), "takings," 28 U.S.C. § 1605(a)(3), and waiver, 28 U.S.C. § 1605(a)(1). The District Court ordered the parties to engage in limited discovery on the threshold question of jurisdiction. *Whiteman v. Austria*, 00 Civ. 8006, slip op. at 5 (S.D.N.Y. June 10, 2002). The District Court entered a further order denying defendants' application that the Court decide a motion to dismiss prior to requiring them to undergo jurisdictional discovery. *Whiteman v. Austria*, No. 00 Civ. 8006, 2002 WL 31368236, at *8 (S.D.N.Y. Oct. 21, 2002). Defendants appealed the discovery order, No. 02-9361, then filed a petition for writ of mandamus to compel the District Court to decide their motion to dismiss, No. 02-3087.

Each of the instant cases raises the threshold questions whether and on what terms the federal courts have jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611, to adjudicate the liability of sovereign states for conduct occurring prior to the statute's enactment.

Another panel of this Court recently held in *Abrams v. Société Nationale Des Chemins De Fer Francais*, 332 F.3d 173 (2d Cir. 2003), that whether the FSIA applies retroactively in a particular case depends on whether such application

would have an impermissible "retroactive effect"—that is, whether applying the FSIA would "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 180-81 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (internal quotation marks omitted)). This determination requires "a common-sense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 185 (quoting *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal quotation marks omitted)). The *Abrams* Court therefore concluded that whether or not the FSIA applied retroactively to alleged offenses that occurred prior to the statute's enactment depended on whether the plaintiffs in a particular case "could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA's enactment." *Id.* at 186. Such a determination requires the District Court to conduct a factual inquiry into the sovereign immunity enjoyed by the particular state—in *Abrams*, France; in the instant cases, Poland and Austria—prior to the enactment of the FSIA. *See id.* at 186-87.

As our Court recognized in *Abrams*, the general history of United States policy on sovereign immunity is well established. *See id.* at 176-78. Judicial determinations of jurisdiction over sovereign states prior to the FSIA "usually deferred to the decision of the executive" regarding sovereign immunity, which was often expressed in the form of a "suggestion of immunity" filed by the Department of Justice at the request of the Department of State. *Id.* at 176-77. In this manner, "the executive branch played a prominent role in deciding whether a foreign sovereign was immune from suit in American courts." *Id.* at 176. "Prior to 1952, the United States adhered to the absolute theory of foreign sovereign immunity," but that year the Department of State "announced [a] formal change of policy" to the "restrictive theory of sovereign immunity." *Id.* at 177. Under the new theory, sovereign states retained immunity from claims.

challenging their "governmental activities," but they no longer enjoyed immunity in United States courts from "claims arising out of [their] commercial activities." *Id.*

In *Abrams* the Court found that this general history of sovereign immunity was insufficient to support a factual determination of the legitimate expectations of a corporation wholly owned by the French government with respect to sovereign immunity, given the "prominent role" of case-by-case recommendations from the Department of State in sovereign immunity determinations prior to the passage of the FSIA. *See id.* at 176, 186-88. Accordingly, the Court remanded to allow the District Court to undertake a factual inquiry into the Department of State's position prior to the FSIA on sovereign immunity for such an entity. *See id.* at 188.

Faced with this development in the law of the Circuit since we heard oral argument in these matters, we remand for determinations of the Department of State's policy prior to FSIA with respect to sovereign immunity for Poland and Austria in the circumstances presented in each of the instant cases. We note that on remand there exists the possibility that specific evidence of the Department of State's position with respect to a particular country during a given period of time and in the circumstances presented may not exist, and thus that we may generally be forced to rely for such factual determinations on the over arching policies of the Department of State prior to the FSIA, which we acknowledged in *Abrams*. *See id.* at 177 (outlining Department of State policy prior to the FSIA, particularly the Department's "formal change of policy" in 1952 from the "absolute theory" of sovereign immunity to the "restrictive theory" of sovereign immunity). Before so relying, however, we remand to give the parties the opportunity to present particular evidence relevant to the Department of State's position on the sovereign immunity of the nation whose conduct is in question in their particular cases. We direct the District Courts to invite the participation

of the Department of State in developing a record to support their determinations.[1]

Finally, although we remand these cases to two different District Courts, we direct those Courts to coordinate their proceedings as much as possible, insofar as such coordination may avoid duplication of judicial proceedings, hearings, and other efforts by counsel, and otherwise preserve scarce judicial and other resources. We also direct the District Courts to coordinate their proceedings temporally to the extent possible, in order to allow for the continued consolidation of these cases on any future appeals.

For the foregoing reasons, (i) the June 26, 2002 judgment in *Garb v. Poland* entered by the United States District Court for the Eastern District of New York is **VACATED**; the discovery order in *Whiteman v. Austria* of the United States District Court for the Southern District of New York is **VACATED**; the petition by defendants-appellants in *Whiteman v. Austria* for writ of mandamus, No. 02-3087, is **DENIED**; and the causes are **REMANDED** for further proceedings consistent with this order.

For the Court,
Roseann B. MacKechnie, Clerk

by s/ Lucille Carr

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1. We caution the District Courts that the necessary factual inquiry should be conducted with appropriate attention to separation-of-powers concerns, inasmuch as the conduct of foreign relations is delegated to the political branches, *see generally Am. Ins. Ass'n v. Garamendi*, 123 S.Ct. 2374, 2386 (2003), and the adjudication of claims that risk significant interference with foreign relations policy may raise justiciability concerns, *see Kadic v. Karadzic*, 70 F.3d 232, 248-49 (2d Cir. 1995).

Supreme Court, U.S.
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No. 03-13

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICUS CURIAE*, SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS IN SUPPORT OF NEITHER PARTY

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THE INTEREST OF THE *AMICUS CURIAE* [1]

The *Amicus Curiae*, like the petitioner in the instant case, is a foreign sovereign as defined in the Foreign Sovereign Immunities Act of 1976, and is a defendant in a suit brought in respect of acts alleged to have taken place during or shortly after World War II. Both the instant case and the case to which the *Amicus* is a party raise the issue of applicability of the FSIA to events prior to its passage, though in different postures. The *Amicus Curiae* has filed a petition for certiorari to the Court of Appeals for the Second Circuit upon which this Court has not yet acted, *Société Nationale des Chemins de Fer Français v. Abrams et al*, No. 03-284, filed August 22, 2003.[2] Since the decision in the instant case may well have an impact on the outcome of the suit against the *Amicus*, either in this Court (if review is eventually granted) or (if review is denied) in further proceedings in the lower courts, prudence dictates that the position of the *Amicus* be presented to the Court at this time. As explained hereafter, the position of the *Amicus* is not identical to the position of either party in the instant case, and this brief is not submitted in support of either party.

---

1. The parties have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court. This brief has been authored in its entirety by undersigned counsel for the *amicus curiae*. No person or entity, other than the named *amicus* and its counsel, has made any monetary contribution to the preparation and submission of this brief.

2. The case was conferenced on November 7, 2003, but no action was taken.

SUMMARY OF ARGUMENT

1. For purposes of determining whether a jurisdictional statute applies to actions brought after passage of the statute based on events prior to passage, a distinction must be drawn between jurisdiction-conferring and jurisdiction-ousting provisions. Different provisions of the Foreign Sovereign Immunities Act have different effects — some conferring and some denying jurisdiction. Section 1605(a)(3) of the FSIA, the provision at issue in the instant case, for the first time bestows jurisdiction on U.S. courts to hear initial claims against a sovereign arising from an alleged expropriation. Other provisions of the Act operate to preclude jurisdiction against a foreign sovereign or sovereign instrumentality. In particular, § 1603(b) provides that state instrumentalities as defined are entitled to the same immunities as the sovereign, i.e., that there is no jurisdiction unless one of the exceptions to immunity is applicable. As World War II claims against foreign sovereigns and their instrumentalities continue to proliferate, the Court should be careful to focus on the several provisions of the FSIA involved in such cases, and to keep the relevant distinctions in mind.

2. The unprecedented search conducted by the Court of Appeals in the instant case in order to deduce how the State Department would have responded to a request for immunity six decades ago is too speculative to support a determination with respect to jurisdiction and immunity. The Second Circuit has built on the approach of the Ninth Circuit in the *Altmann* case before the court on this petition to launch deeper and even more speculative inquiries that impair the separation of powers and contradict the express intent of the Congress to remove the State Department from case-by-case participation in litigation against foreign sovereigns.

ARGUMENT

I. The Instant Case Presents Different Considerations From The Case Brought Against The *Amicus Curiae*, And In Interpreting The Foreign Sovereign Immunities Act The Court Should Be Careful To Preserve These Critical Distinctions.

A. Any Ruling on Impermissible Retroactivity in This Case Should be Limited to Application of Provisions Conferring Jurisdiction Where No Jurisdiction Existed Before.

This case, like the action brought against the *Amicus Curiae*, raises the question of application of the Foreign Sovereign Immunities Act of 1976 to claims based on events during or shortly after World War II. However, in the instant case, plaintiff relies on the FSIA to confer jurisdiction over a claim that almost certainly could not have been brought in a U.S. court prior to adoption of the Act,[3] and *sovereign defendants* contend that applying the provision to them would be "impermissibly retroactive." In contrast, in the action brought against the *Amicus Curiae*, *Abrams et al v. SNCF*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001), *vacated and remanded*, 332 F.3d 173 (2d Cir. 2003), the FSIA bars plaintiffs' claim and it is the sovereign defendant who relies on the Act while *plaintiffs* urge that applying the Act would be "impermissibly retroactive." In *Abrams*, plaintiffs argue that they could have brought their action prior to adoption of the Act since,

3. We say "almost" certainly because the claim arose in the age of absolute immunity, when suits could not be brought against foreign sovereigns in the United States. However, plaintiffs in *Altmann* contended, and the Ninth Circuit agreed, that Austria could not reasonably have expected the State Department to grant it immunity.

as they contend, a claim of sovereign immunity would not have been allowed. Defendant, *Amicus Curiae* herein, disputes that contention, and the Court of Appeals did not accept it, but remanded the case to the District Court for further inquiry with respect to the pre-1952 U.S. law and practice. The *Amicus Curiae* submits that conferral of jurisdiction by statute, as asserted by plaintiff in the instant case, is fundamentally different for purposes of retroactivity analysis from limiting the jurisdiction of courts by statute, as was clarified by passage of the FSIA with respect to claims over state instrumentalities such as *Amicus* SNCF.

It is the submission of *Amicus Curiae*, supported as hereinafter set out briefly and set out in greater detail in its petition for certiorari in Case 03-284, that a statutory limitation of jurisdiction always operates prospectively and is therefore not caught in the dilemma of "impermissible retroactivity." Conferral of jurisdiction on a court, on the other hand, such as inclusion for the first time of claims against a foreign state based on expropriation, FSIA § 1605(a)(3), has been subject to a retroactivity analysis, to determine: (a) whether Congress intended the new cause of action to be available in respect to events prior to the enactment; and (b) in the absence of clear intent, whether applying the statute to pre-enactment conduct would be impermissibly retroactive in that it would frustrate the legitimate expectations and justified reliance of the sovereign defendants. *See, e.g., Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987); *Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988) (both concluding that claims by holders of imperial bonds issued seven decades earlier could not be brought under the FSIA.)

The instant case does not raise the issue of the effect of a jurisdiction-ousting statute directly, since the question presented addresses only the conferral, and not the exclusion of jurisdiction by the FSIA. Thus the Court may well wish to defer the issue of the effect of a statutory bar to jurisdiction to consideration of *Abrams* or some later case. If this is the direction in which the Court wishes to proceed, *Amicus* urges that the Court do so explicitly, lest too general a statement about retroactivity in its judgment in this case blur the distinction here emphasized. Of course, if the Court were to grant review in No. 03-284, *SNCF v. Abrams*, the distinction between conferral and ouster of jurisdiction for purpose of retroactivity analysis could be clearly spelled out by the Court in that case.

B. The Presumption Against Retroactive Application Does Not Apply to Legislation that Forecloses Jurisdiction Over Particular Claims.

In the leading decision on retroactive application of statutes, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court set forth a general presumption against retroactivity:

> [E]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

511 U.S. at 265. The majority opinion in *Landgraf* went on to distinguish statutes "conferring or ousting jurisdiction

whether or not jurisdiction lay when the suit was filed." The Court, per Justice Stevens, wrote:

> Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." [citation omitted]. Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties".

Id. at 274.

In his concurrence in *Landgraf*, Justice Scalia, joined by Justices Kennedy and Thomas, further clarified the relationship between jurisdiction and retroactivity, and pointed out the distinction between jurisdiction-conferring and jurisdiction-eliminating effects:

> . . . the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power — so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.

Id. at 293.

In *Lindh v. Murphy*, 521 U.S. 320 (1997), Chief Justice Rehnquist, joined by Justices Scalia, Kennedy and Thomas, reiterated the need to distinguish between jurisdiction-conferring and jurisdiction-ousting legislation:

> Although in *Hughes Aircraft Co. v. United States ex rel. Schumer*, we recently rejected a presumption favoring retroactivity for jurisdiction-*creating* statutes, . . . nothing in *Hughes* disparaged our longstanding practice of applying jurisdiction-*ousting* statutes to pending cases.

Id. at 342 n.3 (emphases in original).

The suit brought against *Amicus* in the *Abrams* case was not, of course, in any sense a pending case when the FSIA was adopted. But if a door-closing provision can apply even to an action that had already been filed when the statute was passed, it must surely be applicable to a claim based on events more than three decades before passage of the Act and filed nearly a quarter century after passage of the Act.

II. Speculation About How The State Department Would Have Or Might Have Responded To A Request For Sovereign Immunity Sixty Years Ago Is Inevitably Unreliable. Inquiry Into Hypothetical Decisions That Might Have Been Made Long Ago Should Not Form The Basis Of A Judicial Determination Of Jurisdiction In Presently Pending Actions.

The Court of Appeals in the instant case based its determination concerning the application of the jurisdiction-conferring aspect of the Foreign Sovereign Immunities Act to pre-enactment events on its finding as to how the Department of State would have responded to a request for sovereign immunity by Austria. Focusing its inquiry in large part on a document issued by the State Department in quite different circumstances,[4] the Court of Appeals concluded that the Department would not have "recognized and allowed" a request for immunity on behalf of the Republic of Austria at the time of the events giving rise to the claim. Therefore, the Court held, the Republic could not have reasonably

4. In relying in substantial part on the so-called "Bernstein Letter", the Ninth Circuit failed to distinguish between the Act of State doctrine raised as a defense by a private litigant in the *Bernstein* cases, and the issue of sovereign immunity raised by the sovereign in *Altmann*. No government was involved in the *Bernstein* litigation, and no plea of sovereign immunity was raised in those cases. *See Bernstein v. Van Heyghen Frères*, 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947), (act of state doctrine applied to foreclose a private suit by a former owner of ships seized by the former German government); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954), (act of state doctrine not applied following State Department's letter urging that the doctrine not be applied to foreclose acts of the now defunct government of Nazi Germany).

expected a request for immunity to be granted, and hence applying the 1976 Act to the events of the 1940s would not be "impermissibly retroactive." This is the first instance since the passage of the Foreign Sovereign Immunities Act where a U.S. court has based its decision on its speculation as to how the Department of State would have responded to a request for immunity on behalf of a sovereign, and the conclusion is inherently unpersuasive.

The Court of Appeals in *Abrams* took its cue from *Altmann*, but carried the process a significant step further. The court remanded the *Abrams* case to the District Court with instructions to "develop a record" as to how the State Department would have responded to a request for immunity on behalf of a French state instrumentality, *Amicus* herein.

In carrying out this direction, the District Court has addressed a letter to the Legal Adviser of the State Department stating:

> I would appreciate, if you think it appropriate, your considered view whether the State Department would have recognized a sovereign immunity claim if this case had been brought in the immediate post-war period.

Letter from District Judge David G. Trager, August 28, 2003.

In two cases heard after *Abrams*, a different panel of the Second Circuit followed the lead of the panel in *Abrams*, remanding claims brought against Poland and Austria to the respective district courts with directions to "invite the participation of the Department of State in developing a record to support their determinations." *Garb v. Republic of*

Poland, 2003 WL21890843 (2d Cir. Aug. 6, 2003), (certiorari applied for); *Whiteman v. Republic of Austria*, WL 31868236 (2d Cir. Aug. 6, 2003), (certiorari applied for). The Court of Appeals in the latter cases cautioned the District Courts that the necessary factual inquiry should be conducted "with appropriate attention to separation-of-powers concerns", but otherwise gave no guidance.

As of this writing, the State Department has not responded to the letter from the District Judge. It is evident, however, that the precedent set in the instant case by the Ninth Circuit has already led to roving inquiries about how the Executive Branch would have acted two generations ago in four cases brought against three sovereign states, with still other cases not far behind. Unless this precedent is checked, it seems inevitable that the State Department will be dragged into case-by-case participation in litigation against foreign sovereigns, contrary to the express desire of the Congress in adopting the FSIA.[5] In the process, the orderly construction of an important statute, based on the text and the intention of the Congress, is bound to suffer.

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5. *See Jurisdiction of United States Courts in Suits Against Foreign States*, Report of the House Comm. on the Judiciary, H.R. Rep. No. 94-1487, p. 7 (1976):

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

CONCLUSION

In deciding the issue of retroactivity presented by the instant case, the Court should keep in mind the distinction between jurisdiction-conferring and jurisdiction-foreclosing effects of the FSIA, and should be careful not to preempt the contention of *SNCF* in the *Abrams* case that applying the FSIA to bar suit against it would have no impermissibly retroactive effect. Further, the Court should reject all attempts to run the tape of history backwards, by speculating, or asking the State Department to speculate, how it would have responded to a request for immunity six decades ago.

Respectfully submitted,

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No. 03-13

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 27, 2003
CERTIORARI GRANTED SEPTEMBER 30, 2003

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case Summary

Court of Appeals Docket #: 01-56003 Filed: 6/7/01
Nsuit: 3370 Other Fraud (Fed)
Altmann, et al v. Republic of Austria, et al
Appeal from: Central District of California, Los Angeles

Lower court information:
District: 0973-2 : CV-00-08913-FMC
presiding judge: Florence Marie Cooper, District Judge

* * *

6/7/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): NO. setting schedule as follows: appellant's designation of RT is due 6/15/01, ; appellee's designation of RT is due 6/25/01; appellant shall order transcript by 7/5/01, ; court reporter shall file transcript in DC by 8/6/01; certificate of record shall be filed by 8/13/01 ; appellant's opening brief is due 9/21/01, ; appellees' brief is due 10/22/01; appellants' reply brief is due 11/5/01, ; [01-56003] (crw) [01-56003]

Appendix A

6/7/01	Filed attorney for Appellant Civil Appeals Docketing Statement served on 6/5/01 (to CONFATT) [01-56003] [01-56003] (crw) [01-56003]
7/3/01	Received copy of transcript designation and ordering form filed in DC (sent to case file) (tm) [01-56003]
7/26/01	Case rejected from Circuit Mediation Program. (sa) [01-10335 01-15735 01-15736 01-15915 01-15976 01-15977 01-15992 01-16017 01-16023 01-16080 01-16104 01-16106 01-16108 01-16111 01-16114 01-16173 01-16176 01-16201 01-16204 01-16210 01-16218 01-16232 01-16240 01-16297 01-16310 01-16326 01-16328 01-16391 01-35542 01-35548 01-35569 01-35583 01-35586 01-35636 01-35661 01-55608 01-55774 01-55816 01-55930 01-55941 01-55942 01-55961 01-55966 01-55982 01-55987 01-56003 01-56013 01-56043 01-56050 01-56080 01-56130 01-70787 01-99008]
8/24/01	Filed Scott P. Cooper for Appellant Austria Gallery, Appellant Republic of Austria Civil Appeals Docketing Statement served on 8/23/01 (to CONFATT) [01-56398, 01-56003] [01-56398, 01-56003] (gva) [01-56003 01-56398]

Appendix A

8/24/01	Received notice of representation of Jonathan Rich as cs for aplts; served on 8/23/01 (Casefile) [01-56398, 01-56003] (gva) [01-56003 01-56398]
8/30/01	Filed order (A. W. TASHIMA): The Clerk shall consolidate the newly opened appeal w/appeal no. 01-56003. Respondent's mtn to expedite is granted. The brfing sched in appeal no. 01-56003 shall govern the consolidated appeals. The provisions of 9th Cir. R. 31-2.2(a) shall not apply to this brfing sched. [01-56003, 01-56398] (gail) [01-56003 01-56398]
9/4/01	Filed certificate of record on appeal RT filed in DC None requested. [01-56398, 01-56003] (bg) [01-56003 01-56398]
9/24/01	Received Aplts Republic of Austria, Austria Gallery's opening brief in original & 15 copies of 75 pages (Informal: n); 5 Excs.; served on 9/21/01; deficient: (oversized/br is 17,972 words-mtn to file & copy of br sent to Promo) [01-56003, 01-56398] ******* DO NOT USE ********** (gva) [01-56003 01-56398]
9/26/01	Received letter dated 9/24/01 re: . . . On behalf of aple Maria Altma, I am writing to state that we have no objection ot the aplts' mtn to file a longer br of approximately 18,000 words. . . . (Promo) [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

10/9/01	Filed motion & clerk order Promo: (Deputy Clerk: jlc) Aplts' unopposed mtn to exceed the type-volume limitations for the opening br is granted in part. On or before 10/19/01, aplt shall file an opening br that does not exceed 15,400 words. The ans br of equal length is due 11/19/01. The optional rpy br is due 14 days from service of the ans br. (mtn rcvd 9/26/01) [01-56003, 01-56398] (gva) [01-56003 01-56398]
10/12/01	Received original & 15 copies Aple Maria V. Altmann's brief of 63 pages; served on 10/10/01; deficient: (aplt's br not filed yet) [br needs statement of related cases]. Notified csl. (gva) [01-56003 01-56398]
10/18/01	Received Bet Tzedek Legal Services's Amicus Curiae brief in original & 15 copies of 16 pages; in support of aple; deficient: (mtn to becm am pending in Promo w/1 copy of br) served on 10/17/01. [01-56003, 01-56398] ********** FOR MERITS PANEL ********** (gva) [01-56003 01-56398]
10/18/01	Filed Bet Tzedek Legal Services' motion for leave to file brief as amicus curiae in support of aple; served on 10/17/01 ********** FOR MERITS PANEL ********** [4284616] [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

10/22/01	Filed original & 15 copies Aplt's opening brief (Informal: n) 66 pages [15,398 words] & 5 Excs.; served on 10/19/01 [01-56003, 01-56398] (gva) [01-56003 01-56398]
10/22/01	Filed original & 15 copies Aple Maria V. Altmann's 63 pages, served on 10/10/01; minor defcy: (needs Statement of Related Cases) csl previously notified. [01-56003, 01-56398] (gva) [01-56003 01-56398]
10/23/01	Received Aple Maria V. Altmann satisfaction of (minor) brief deficiency: (Statement of Related Cases); served on 10/19/01 (Records). [01-56003, 01-56398] (gva) [01-56003 01-56398]
10/25/01	Received original and 15 copies corrected Amicus curiae brief of Bet Tzedek Legal Services in support of aple of 16 pages; served on 10/24/01 ********** FOR MERITS PANEL ********** [01-56003, 01-56398] (gva) [01-56003 01-56398]
10/26/01	Filed order Promo: (Deputy Clerk: jlc) The mtn of Bet Tzedek Legal Services ("Bet Tzedek") for leave to file an amicus curiae brief, the amicus brief received on 10/18/01, any opposition, and any related filings shall be referred for disposition to the panel that considers the merits of the case. Any further mtns to file an amicus

brief shall be treated in the same fashion. [4284616-1] [01-56003, 01-56398] (gva) [01-56003 01-56398]

10/29/01 Filed Aty Randol Schoenberg for Appellee Maria V. Altmann ltr dated 10/26/01 re: . . . I did not consent to aplt's mtn to extend time to file reply brief . . . (Promo) [01-56003, 01-56398] (gva) [01-56003 01-56398]

10/31/01 Calendar check performed [01-56003, 01-56398] (mw) [01-56003 01-56398]

11/1/01 Filed motion & clerk order Promo: (Deputy Clerk: jlc) . . . The ct is also in receipt of a ltr dated 10/26/01 from csl for aple in response to aplts' mtn for clarification stating his concerns to have briefing completed and to have the appeal resolved as soon as possible. Aplts' alternative request for an ex.tm.f the rpy br is granted. The rpy br is now due 11/5/01. This appeal is deemed ready for calendaring. Aple is reminded that the merits panel will rule on any mtn to become an amicus curiae pursuant to the clerk's 10/26/01 order. (mtn rcvd 10/26/01) [4288460-1] [01-56003, 01-56398] (gva) [01-56003 01-56398]

11/6/01 Filed original & 15 copies Aplts' reply brief (Informal: n) 30 pages; served on 11/5/01 [01-56003, 01-56398] (gva) [01-56003 01-56398]

11/21/01 CALENDARED: Pasadena Feb 5 2002 9:00 a.m. Courtroom 3 [01-56003, 01-56398] (th) [01-56003 01-56398]

12/7/01 Rec'd notice of change of address from E. Randol Schoenberg counsel for Appellee Maria V. Altmann dated 12/13/01. (CASEFILE) [01-56003, 01-56398, 01-80108] (sm) [01-56003 01-56398 01-80108]

1/1/02 Calendar materials being prepared. [01-56003, 01-56398] [01-56003, 01-56398] (aw) [01-56003 01-56398]

1/8/02 CALENDARED: PASA Mar 7 2002 9:00 am Courtroom 3 [01-56003, 01-56398] (aw) [01-56003 01-56398]

2/14/02 Filed order (Deputy Clerk: eu) Bet Tzedek Legal Services' motion for leave to file amicus br is granted. (phoned 10:00 am) [4284616-1] [01-56003, 01-56398] (gva) [01-56003 01-56398]

2/14/02 Filed original & 15 copies Bet Tzedek Legal Services' amicus curiae brief in support of aple of 16 pages; served on 10/17/01. (previously sent to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

3/7/02	ARGUED AND SUBMITTED TO Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte [01-56003, 01-56398] (rmw) [01-56003 01-56398]
3/20/02	Filed order (Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte): This appeal is referred to the mediation unit to explore a possible resolution through mediation. Submission of this case is vacated until further order of the ct. The mediator should report to the ct every 30 days as to the status of the mediation. The panel is of the view that mediation could bring a resolution that would serve the parties better than results achieved through litigation. mediation unit shall contact the parties directly . . . [01-56003, 01-56398] (gva) [01-56003 01-56398]
4/1/02	Filed order CONFATT (MAC) Pursuant to the referral by the panel, by the order dated 3/20/02, this case is under consideration in the mediation program. A settlement assessment conference will be held by telephone on 4/12/02, at 10:30 am Pacific Time. . . . [01-56003, 01-56398] (gva) [01-56003 01-56398]
4/22/02	Received Aple Maria V. Altmann's additional citations, pursuant to FRAP 28(j); served on 4/19/02 (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

5/9/02	Received E. Randol Schoenberg for Appellee Maria V. Altmann letter dated 5/7/02 re: . . . Could you please let me know whether the case has in fact been re-submitted to the panel for decision? (Confatt(and PANEL ON 5/20/02) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/24/02	Filed order (Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte): This case is ordered resubmitted. [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/24/02	Case resubmitted on this date to Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte. (See previous deferral of submission.) Order filed: 5/24/02. [01-56003, 01-56398] (gva) [01-56003 01-56398]
7/1/02	Received Aples' additional citations, pursuant to Rule 28(j); served on 6/28/02 (Panel) [01-56398, 01-56003] (gva) [01-56003 01-56398]
8/12/02	Rec'd notice of change of firm name from E. Randol Schoenberg for Appellee Maria V. Altmann. New name: BURRIS & SCHOENBERG, LLP 12121 Wilshire Blvd., Suite 800, Los Angeles CA 90025; served on 8/8/02 (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

9/13/02	Filed Maria V. Altmann's additional citations, pursuant to FRAP 28(j); served on 9/12/02 (Panel) (gva) [01-56003 01-56398]
10/3/02	Filed Aple Maria V. Altmann's additional citations, pursuant to FRAP 28(j); served on 10/1/02 (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]
11/20/02	Copy of letter received from Maria V. Altmann addressed to Judge Florence Marie Cooper re: . . . status of appeal (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]
12/12/02	FILED OPINION: AFFIRMED AND REMANDED. (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Kim M. WARDLAW, author; William A. FLETCHER; Ronald M. Whyte) FILED AND ENTERED JUDGMENT. [01-56003, 01-56398] (gva) [01-56003 01-56398]
12/20/02	Filed Aplts' motion to ex.tm.f a petition for panel rehearing and rehearing en banc; declaration of Jonothan Rich; [30 days] served on 12/19/02 (Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

12/23/02	Filed order (Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte,): The motion by aplts to extend the time to file a petition for panel rehearing and rehearing en banc is hereby DENIED. (PHONED OUT 4:30) [01-56003, 01-56398] (hh) [01-56003 01-56398]
12/23/02	Received letter from attorney E. Randol Schoenberg for Appellee Maria V. Altmann letter dated 12/17/02 re: opposing appellant's request for an extension of time to file petition for rehearing. (PANEL by fax) [01-56003, 01-56398] (ru) [01-56003 01-56398]
12/24/02	Filed Appellant Republic of Austria, Austria Gallery motion to extend time to file petition for rehearing and rehearing en banc pursuant to General Order 6.3a; served on 12/23/02 [4613903] [01-56003, 01-56398] (ru) [01-56003 01-56398]
12/24/02	Filed order (Deputy Clerk: ru) The court sua sponte grants appellants' motion for a 7 day extension of time to file a petition for rehearing or rehearing en banc; petition due 1/2/03. [01-56003, 01-56398] (ru) [01-56003 01-56398]
12/26/02	Filed Appellee Maria V. Altmann's bill of costs $69.75; served on 12/24/02 [01-56003, 01-56398] (gva) [01-56003 01-56398]

Appendix A

1/2/03	[4618718] Filed original & 50 copies Aplts' petition for panel rehearing and petition for rehearing en banc of 17 pages [4,164 words]; served on 12/31/02 (Panel And All Active Judges) [01-56003, 01-56398] (gva) [01-56003 01-56398]
1/2/03	Filed Aplts' request for judicial notice in support of their petition for panel rehearing with suggestion for rehearing en banc; [filed concurrently with petition for panel rehearing with suggestion for rehearing en banc]; served on 12/31/02 (Panel And All Active Judges) [01-56003, 01-56398] (gva) [01-56003 01-56398]
1/6/03	Filed appellee Maria V. Altmann's motion to dismiss untimely petition for panel rehearing with suggestion for rehearing en banc and for issuance of mandate; served on 1/3/03 [4620948] (to PANEL) (hh) [01-56003 01-56398]
1/7/03	Filed (faxed) Aplts' opposition to aple's motion to dismiss untimily petition for panel rehearing with suggestion for rehearing en banc and for issuance of mandate; declaration of Joanathan E. Rich; served on 1/7/03 (faxed to Panel) [4620948-1] [01-56003, 01-56398] (Orig. rcvd 1/8/03) (gva) [01-56003 01-56398]
1/9/03	Filed order (Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte): Judge Tashima ordered this matter expedited on 8/30/01.

Appendix A

We filed our decision affirming the dc on 12/12/02 and unanimously denied the motion by aplts to extend the time to file a petition for panel rehearing and rehearing en banc on 12/23/02, which motion requested an extendion of the 12/26/02 deadline to 1/27/03. The clerk of the 9th Circuit CA thereafter on 12/24/02 granted 7-day ex.tm pursuant to Gen. Order 6.3(a). The aplts filed their petition for pandl rehearing with suggestion for rehearing en banc on 1/2/03, which was the last day for filing according to the ex.tm granted by tne clerk. The aple correctly argues that the clerk's granting of a 7-day ex.tm. violated the spirit, if not the letter, of Judge Tashima's order expediting the appeal and certainly conflicted with our denying the extension of time. Nevertheless, when an aplt timely requests an ex.tm, is informed by the clerk that the ex.tm has been granted, and, relying upon the representation of the clerk of the court, delays filing until after the original deadline has passed, the enforcement of the original deadline would be harsh and unfair. In any event the aplts "Petition for Panel Rehearing with Suggestion for Rehearing En Banc" has been circulated to the enire court and it would be appropriate for the aple to have an opportunity to respond. Accordingly, we deny the aple's Motion to Dismiss Unitimely Petition For Panel Rehearing with Suggestion For Rehearing En Banc and for Issuance of Mandate, and order the aple to respond to the aplts' petition on or before 1/30/03. No further ex.tm will be

granted in this matter, including in any and all future proceedings. The aple's motion is hereby DENIED. (phoned/faxed) [4620948-1] in 01-56003, 01-56398 [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/10/03 Filed USA's letter dated 1/9/03 treated as motion to become amicus; served on 1/9/03 (faxed to Panel) [4625174] [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/14/03 Received original & 50 copies USA amicus curiae brief of 18 pages; deficient: (mtn to becm am pending); served on 1/13/03. (faxed/fed.ex to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/14/03 Filed USA's motion for leave to file brief as amicus curiae in support of petition for rehearing and suggestions for rehearing en banc; served on 1/13/03 (faxewd to Panel) [4627807] [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/17/03 Filed order (Deputy Clerk: hh) The mtn of the USA for leave to file brief as amicus curiae in support of petition for rehearing and suggestion for rehearing en banc is granted. in 01-56398, 01-56003 [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/17/03 Filed original & 50 copies USA's amicus curiae brief in support of petition for rehearing en banc of 18 pages; served on 1/13/03 (TO ALL ACTIVE JUDGES/PANEL WAS PREVIOUSLY SERVED) [01-56003, 01-56398] (gva) [01-56003 01-56398]

1/28/03 Filed Aple's response to aplt's petition for enbanc rehearing of 15 pages; served on 1/27/03 (Panel And All Active Judges) [01-56003, 01-56398] (gva) [01-56003 01-56398]

3/19/03 Received Appellee Maria V. Altmann in 01-56003 01-56398 and 01-80108 letter dated 3/14/03 requesting the status of the petition for rehearing. served on 3/14/03 (notified aplt rehearing pending) [01-56003, 01-56398, 01-80108] (vt) [01-56003 01-56398 01-80108]

4/23/03 Received Maria V. Altmann's additional citations, pursuant to FRAP 28(j); served on 4/21/03 [01-56003, 01-56398] (gva) [01-56003 01-56398]

4/28/03 Received Maria V. Altmannt's additional citations, pursuant to FRAP 28(j); served on 4/24/03 (Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

4/28/03	Filed order (Kim M. WARDLAW, William A. FLETCHER, White): The opinion filed 12/12/02 . . . is amended as follows . . . The petition for panel rehearing and the petition for rehearing en banc are denied. No further petitions for rehearing will be entertained. [4618718-1] in 01-56003, 01-56398 [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/2/03	Filed Aplts Republic of Austria, Austria Gallery motion to stay the mandate; served on 5/2/03 (KMW) [4726750] [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/6/03	Filed Aple Maria V. Altmann's opposition to motion to stay issuance of mandate; served on 5/2/03 (KMW) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/6/03	Filed order (Kim M. WARDLAW, William A. FLETCHER, Ronald M. Whyte): The Motion by Appellants to Stay the Issuance of the Mandate is hereby DENIED. [01-56003, 01-56398] (ru) [01-56003 01-56398]
5/9/03	Received Aplts' copy of motion to stay the mandate of USCA for the Ninth Circuit pending certiorari [filed in USSC]; served on 5/8/03 (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]

5/13/03	Filed Supreme Court order (SC Date: 5/13/03) It is ordered that the mandate of the USCA for the Ninth Circuit, case Nos. 1-56003 and 1-56398 be, and the same is hereby, stayed pending receipt of a response and further order of the undersigned court. [Sandra Day O'Connor Associate Justice of the USSC] (Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/16/03	Received courtesy copy of petitioners' reply in suport of their application to stay mandate filed in the USSC; served on 5/15/03 (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/16/03	Received Respondent Maria Altmann's opposition to application to stay mandate; served on5/14/03 [filed in the USSC] (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/16/03	Received petitioner's proof of service of USSC's 5/13/03 order on USCA (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]
5/19/03	Filed Faxed Supreme Court order (SC Date: 5/19/03) The application for a stay of mandate presented to Justice O'Connor and by her referred to the Court is granted pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be

denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

5/19/03 Filed Supreme Court order (SC Date: 5/13/03) Upon consideration of the application of counsel for the applicant. It is ordered that the mandate of the USCA for the Ninth Circuit, case Nos. 1-56003 and 1-56398, be and the same is hereby, stayed pending receipt of a response and further order of the undersigned or of the court. [Sandra Day O'Connor Associate Justice of the USSC]. (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

5/19/03 Copy of letter dated 5/15/03 received from Maria V. Altmann addressed to Troy D. Cahill office of USSC re: . . . to correct several misstatements made by petitioners in their reply br. . . . (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

5/27/03 Filed Supreme Court order (SC Date: 5/19/03) The appl for a stay of mandate presented to Justice O'Connor and by her referred to the Court is granted pending the disposition of the petition for a writ of cert. Should the pet for a writ of cert be denied, this stay shall terminate automatically. In the event the pet for writ of cert

is granted, the stay shall terminate upon the sending down of the judgment of this ct. PANEL [01-56003, 01-56398] (gar) [01-56003 01-56398]

7/7/03 Received letter from the Supreme Court dated 7/1/03 re: The petition for a writ of certiorari in the above entitled caee was filed on 6/27/03 and placed on the docket 7/1/03 as No. 03-13 (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]

7/8/03 Received from Scott Cooper aty for Aplts Republic of Austria & Austria Gallery letter dated 7/2/03 re: . . . timely filed their petition for writ of certiorari with SC on 6/27/03 (Casefile) [01-56003, 01-56398] (gva) [01-56003 01-56398]

10/6/03 Received letter from the Supreme Court dated 9/30/03 re: The court today entered the following order in the above entitiled case. The petition for a writ of certiorari is granted limited to question one presented by the petition. (faxed to Panel) [01-56003, 01-56398] (gva) [01-56003 01-56398]

APPENDIX B — DOCKET OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

U.S. District Court

Central District of California (Western Div.)

CIVIL DOCKET FOR CASE #: 00-CV-8913

Maria V Altmann v. Republic of Austria, et al

Filed: 08/22/00
Assigned to: Judge Florence-Marie Cooper
Referred to: Discovery Ann I. Jones
Demand: $150,000,000
Nature of Suit: 370
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 31:3731 Fraud

MARIA V ALTMANN, an individual
plaintiff

E Randol Schoenberg
FAX 310-442-0353
[COR LD NTC]
Burris & Scheonberg
12121 Wilshire Blvd, Ste 800
Los Angeles, CA 90025-1171
310-442-5559

Appendix B

v.

REPUBLIC OF AUSTRIA, a Foreign state
defendant

Scott P Cooper
FAX 310-557-2193
[COR LD NTC]
Jonathan E Rich
[COR LD NTC]
Tanya L Forsheit
[COR LD NTC]
Andrea K Douglas
FAX 310-557-2193
[COR LD NTC]
Proskauer Rose
2049 Century Park E, Ste 3200
Los Angeles, CA 90067-3206
310-557-2900

AUSTRIAN GALLERY, an agency of the Republic of Austria
defendant

Scott P Cooper
(See above)
[COR LD NTC]
Jonathan E Rich
(See above)
[COR LD NTC]
Tanya L Forsheit
(See above)
[COR LD NTC]

Appendix B

Andrea K Douglas
(See above)
[COR LD NTC]

BET TZEDEK LEGAL SERVICES
amicus

Margot A. Metzner
FAX 213-892-5454
[COR LD NTC]
Janie F Schulman
FTS Ext 5393
FAX 213-892-5454
[COR LD NTC]
Michael James Bostrom
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555 W 5th St, Ste 3500
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213-892-5200

David A Lash
[COR LD NTC]
Bet Tzedek Legal Services
145 S Fairfax Ave
Ste 200
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323-549-5848

Sheila Olivarez Recio
FAX 949-251-0900
[COR LD NTC]
Morrison & Foerster

Appendix B

19900 MacArthur Blvd, Ste 1200
Irvine, CA 92612-2445
949-251-7500

MARIA V ALTMANN, an individual
plaintiff

v.

REPUBLIC OF AUSTRIA, a Foreign state; AUSTRIAN GALLERY, an agency of the Republic of Austria
defendant

BET TZEDEK LEGAL SERVICES
amicus

Appendix B

DOCKET PROCEEDINGS

Date	#	Docket Entry
8/22/00	1	COMPLAINT filed Summons(es) issued referred to Discovery Ann I. Jones (jag) [Entry date 08/25/00]
8/22/00	2	CERTIFICATION OF INTERESTED PARTIES filed by plaintiff Maria V Altmann (jag) [Entry date 08/25/00]
8/22/00	—	ORIGINAL SUMMONS issued as to defendant Republic of Austria, a foreign state & Austrian Gallery, an agency of the Republic of Austria (yl) [Entry date 10/04/00] [Edit date 10/04/00]
9/22/00	3	EX PARTE APPLICATION filed by plaintiff for issuance of letters rogatory & amd of sms Lodged Request; Let Rog issd on 10/19/00 (rrey) [Entry date 09/25/00] [Edit date 10/19/00]
12/12/00	4	CERTIFICATION AS TO INTERESTED PARTIES filed by defendant Republic of Austria, defendant Austrian Gallery (rrey) [Entry date 12/13/00]
12/12/00	5	EX PARTE APPLICATION filed by defendants for an Ord extending time w/in which to resp to cmp; decl of Jonathan E Rich; Lodged Propsd Ord (rrey) [Entry date 12/14/00]

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12/14/00	6	ORDER by Judge Florence-Marie Cooper granting exparte appl for an Ord extending time w/in which to resp to cmp [5-1]; dfts shall resp to the cmp on or before 1/22/01 (rrey) [Entry date 12/15/00]
12/14/00	7	OPPOSITION by plaintiff to exparte appl for an Ord extending time w/in which to resp to cmp [5-1]; decl of E Randol Schoenberg (rrey) [Entry date 12/18/00]
1/5/01	8	STIPULATION and ORDER by Judge Florence-Marie Cooper extending time to answer complaint [1-1] to 2/5/01 as to defendants Republic of Austria, Austrian Gallery (rrey) [Entry date 01/08/01]
1/10/01	9	CERTIFICATION of an Executed Letter Rogatory by James D Pettit, Consul General of the USA (rrey) [Entry date 01/16/01]
1/31/01	10	STIPULATION and ORDER by Judge Florence-Marie Cooper that the briefing schedule on dfts motion to dismiss shall be as fols: (1) Dfts mot to dism shall be fld on/before 2/5/01; (2) plf's opp shall be fld on/before 2/26/01; (3) Dfts Reply shall be fld on/before 3/12/01; & Hrg on the mtr shall be ntc for 3/19/01 @ 10:00 or such other date as the Crt deems proper. (jp) [Entry date 02/02/01]

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2/5/01	11	NOTICE OF MOTION AND MOTION by defendants to dismiss cmp ; motion hearing set for 10:00 3/19/01 (rrey) [Entry date 02/06/01]
2/5/01	12	DECLARATION of Dr Walter Friedrich by defendants in suppt of motion to dismiss cmp [11-1] (rrey) [Entry date 02/06/01]
2/8/01	13	NOTICE OF ERRATA by defendants to motion to dismiss cmp [11-1] (rrey) [Entry date 02/09/01]
2/21/01	14	SUPPLEMENTAL MEMO by defendants re motion to dismiss cmp [11-1] (rrey) [Entry date 02/22/01]
2/26/01	15	PROOF OF SERVICE by Amicus Curiae Bet Tzedek Legal Services on 2/26/01 of Ex Parte Appl for leave to file brief in Opp to Mot to Dism; Memo PA in suppt of Plfs Opp to Dfts Mot; Decl of Janie F Schulman in suppt of Ex Parte Appl; Decl of David A Lash in suppt of Ex Parte Appl; [Proposed] Ord (dw) [Entry date 02/27/01]
2/26/01	16	MEMO OF P&A IN OPPOSITION by plaintiff Maria V Altmann to motion to dismiss cmp [11-1] (bg) [Entry date 02/27/01]

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2/26/01	17	DECLARATION of Dr Stefan Gulner by plaintiff Maria V Altmann in opp re motion to dismiss cmp [11-1] (bg) [Entry date 02/27/01]
2/26/01	18	DECLARATION of E Randol Schoenberg by plaintiff Maria V Altmann in opp re motion to dismiss cmp [11-1] (bg) [Entry date 02/27/01]
2/26/01	19	EX PARTE APPLICATION filed by amicus curiae Bet Tzedek Legal Svc for leave to file brief in opp to mot to dism; Lodged propsd ord (rrey) [Entry date 02/27/01]
2/26/01	20	MEMORANDUM OF P/A IN SUPPORT by amicus Bet Tzedek Legal Svc of exparte appl for leave to file brief in opp to mot to [19-1] (rrey) [Entry date 02/27/01]
2/26/01	21	DECLARATION of David A Lash by amicus Bet Tzedek Legal Svc in suppt of exparte appl for leave to file brief in opp to mot to dism [19-1], & in suppt of brief in opp to motion to dismiss cmp [11-1] (rrey) [Entry date 02/27/01]
2/26/01	22	DECLARATION of Janie F Schulman by amicus Bet Tzedek Legal Svc in suppt of exparte appl for leave to file brief in opp to mot to dism [19-1] (rrey) [Entry date 02/27/01]

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2/27/01	23	ORDER by Judge Florence-Marie Cooper granting exparte appl for leave to file brief in opp to mot to dism [19-1] (rrey) [Entry date 02/28/01]
2/28/01	24	RESPONSE by defendants to exparte appl for leave to file brief in opp to mot to dism [19-1] (rrey) [Entry date 03/01/01]
3/5/01	25	COUNTER-STATEMENT IN OPPOSITION by defendants' Republic of Austria, Austrian Gallery to notice of related case. (bp) [Entry date 03/06/01]
3/12/01	26	REPLY Memo of points & authorities by defendant Republic of Austria, defendant Austrian Gallery in support of motion to dismiss cmp [11-1] (bp) [Entry date 03/13/01]
3/12/01	27	DECLARATION of Dr. Walter Friedrich by defendant Republic of Austria, defendant Austrian Gallery in support of motion to dismiss cmp [11-1] (bp) [Entry date 03/13/01]
3/14/01	28	MINUTES: The crt, on its own mot, hereby continues the hearing on motion to dismiss cmp [11-1] 10:00 4/30/01 by Judge Florence-Marie Cooper CR: N/A (bp) [Entry date 03/15/01]

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3/14/01	29	PROOF OF SERVICE by defendant Republic of Austria on 3/13/01, of dfts' reply memo of points and authorities. (bp) [Entry date 03/15/01]
4/30/01	30	Plaintiff Maria Altmann's suggested corrections to tentative order denying defendants' motion to dismiss. (bp) [Entry date 05/01/01]
4/30/01	31	MINUTES: The motion to dismiss cmp [11-1] is taken under submission, final order to issue by Judge Florence-Marie Cooper CR: Pat Cuneo (bp) [Entry date 05/02/01]
5/2/01	32	RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 4/30/01 CR: Pat Cuneo (dl) [Entry date 05/03/01]
5/2/01	—	TRANSCRIPT filed for proceedings held on 4/30/01 (dl) [Entry date 05/03/01]
5/4/01	33	ORDER denying defendant's motion to dismiss. Plaintiff is granted fifteen (15) days' leave to amend the complaint to set forth the basis for venue pursuant to 1391(f)(3), by Judge Florence-Marie Cooper denying motion to dismiss cmp [11-1] (ENT 5/7/01) (sent) (bp) [Entry date 05/07/01]

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5/8/01 34 REQUEST by defendant Republic of Austria for clarification of order denying defendants' motion to dismiss and certifying issues for appeal. (bp) [Entry date 05/09/01]

5/9/01 35 MINUTES: On 5/8/01, defendants filed a request for clarification of the court's 5/4/01, order denying dfts' mot to dism. The final section, section IX, of the court's 5/4/01, order denying defendant's mot to dismiss is hereby amended to read: Conclusion for the reasons stated herein, defendant's mot to dismiss is denied. Plaintiff is granted fifteeen (15) days' leave to amend the complaint to set forth the bases for venue by Judge Florence-Marie Cooper CR: N/A (bp) [Entry date 05/11/01]

6/5/01 36 NOTICE OF APPEAL/REPRESENTATION STATEMENT by defendant Republic of Austria, a foreign state, defendant Austrian Gallery, an agency of the Republic of Austria to 9th C/A from Dist. Court ord fld 5/4/01 & ent 5/7/01 [33-1] (cc: xScott P. Cooper, E. Randol Schoenberg, Morrison & Foerster) Fee: Paid (dl) [Entry date 06/06/01]

6/5/01 37 PROOF OF SERVICE by defendant Republic of Austria, defendant Austrian Gallery (dl) [Entry date 06/06/01]

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7/2/01 38 TRANSCRIPT DESIGNATION and ordering form for dates: 4/30/01 re transcript [32-1] CR: P. Cuneo. (fvap) [Entry date 07/11/01]

7/11/01 39 CERTIFICATE of Record Transmitted to USCA (01-80108) (cc: all parties) (pjap) [Entry date 07/11/01]

7/16/01 40 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [36-1] 01-56003 (dl) [Entry date 07/16/01]

7/19/01 41 AMENDED CERTIFICATE of Record Transmitted to USCA (01-56003) (cc: all parties) (pjap) [Entry date 07/19/01]

8/20/01 42 CC ORDER FROM USCA: Petn for permission to app purs to 28 U.S.C. Section 1292(b) is GR. W/in 10 days of this ord, petrs shall perfect app purs to FRAP 5(d). Upon petrs' compliance w/this ord & docketing of new app, Clerk shall consol newly opened app w/app no. 01-56003. Resp's mot to expedite is GR. Briefing sched in app no. 01-56003 shall govern consol apps. Provisions of 9th Circuit Rule 31-2.2(a) shall not apply to this briefing sched. Clk shall cal consol apps on next available cal after completion of briefing. (01-80108) (01-56398) (pjap) [Entry date 08/21/01] [Edit date 08/24/01]

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8/23/01 — Appeal Fee Paid re [42-1] fee in amount of $105.00. (01-56398) (wdc) [Entry date 08/23/01] [Edit date 08/24/01]

8/30/01 43 NOTICE of No Transc Designated or Ord for C/A for the 9th Circuit Docket # 01-56398 (Consol w/ 01-56003). (wdc) [Entry date 08/31/01]

8/31/01 44 CERTIFICATE of Record Transmitted to USCA - 01-56398; 01-56003 (cc: all parties). (wdc) [Entry date 08/31/01]

11/5/01 45 ORDER FROM USCA: Applnt's alternative req for an ext of time to fl reply is GR. Reply brief is due 11/05/01. (cbr) [Entry date 11/09/01]

12/19/01 46 NOTICE OF CHANGE Of Address filed by atty E Randol Schoenberg for plaintiff Maria V Altmann; New address reflect a new suite # & ne 9-digit zip code; 12121 Wilshire Blvd, Ste 800, Los Angeles, CA 90025-1168. (nhac) [Entry date 12/20/01]

2/8/02 47 CLERK'S record on appeal transmitted to Circuit [36-1] vols: 2;transcripts: 1 & brown folder doc # 12. (not included doc# 11) 01-56003 & 01-56398 (ghap) [Entry date 02/08/02]

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2/19/02 48 ORDER FROM USCA Bet Tzedek Legal Services'mot for leave to file amicus brief is GR. 01-56003,01-56398 (ghap) [Entry date 02/22/02]

3/25/02 49 ORDER FROM USCA app is ref to the mediation unit to explore a possible resolution through mediation. Submission of this case is vac until fur ord of the crt. 01-56003 & 01-56398 (ghap) [Entry date 03/27/02]

4/4/02 50 ORDER FROM USCA a sttlmnt assessmant conf will be held by telephone on 4/12/02, at 10:30 a.m. PACIFIC Time. 01-56003 & 01-56398 (ghap) [Entry date 04/08/02]

6/20/02 51 MINUTES: The court orders parties to file a joint report as to the status of the appeal within 10 days from the date of this order by Judge Florence-Marie Cooper CR: N/A (bp) [Entry date 06/20/02]

6/25/02 52 JOINT REPORT as to status of appeal filed (bp) [Entry date 06/26/02]

8/9/02 53 NOTICE OF CHANGE Of Firm Name filed by atty E Randol Schoenberg for plaintiff Maria V Altmann that Lawfirm name has changed to Burris & Schoenberg, LLP, 12121 Wilshire Blvd, Ste 800, Los Angeles, CA 90025; Telephone No.: 310-442-5559; Fax No.: 310-442-0353. (jp) [Entry date 08/12/02]

1/14/03 54 ORDER FROM USCA: we deny the appellee's motion to dismiss untimely petition for panel rehearing with suggestion for rehearing En Banc & for issuance of Mandate, & order the the appellee to respond to the appellants' petition on or before 1/30/03. No further extensions of time will be granted in this matter, including in any & all future proceedings. The appellee's motion is hereby denied. (01-56003, 01-56398) (weap) [Entry date 01/16/03]

1/21/03 55 ORDER FROM USCA: Motion of United States of America for Leave to File Brief as Amicus Curiae in Support of Petition For Rehearing and Suggestion of Rehearing En Banc granted. (01-56003, 01-56398) (pjap) [Entry date 01/23/03]

5/14/03 56 NOTICE OF DISCREPANCY AND ORDER by Judge Florence-Marie Cooper ordering proof of service of order of the Supreme Court submitted received on 5/14/03 is not to be fld but instead rejected (bp) [Entry date 05/16/03]

5/14/03 58 RECORD on appeal returned from U.S. Court of Appeals re appeal [36-1] vols: 1 thru 2; transcripts: 1; brown folders: 1, document number 12. (cbr) [Entry date 06/25/03]

5/16/03 57 NOTICE OF DISCREPANCY AND ORDER by Judge Florence-Marie Cooper ordering reply in support of applicatio submitted received on 5/16/03 to be fld and processed; fld date to be the date the doc was stamped "received but not fld" w/the Clerk (bp) [Entry date 05/21/03]

6/25/03 59 NOTICE of Clerical Error and Correction of Scanned Document. You are hereby notified that due to a clerical error, the following scanned document has been corrected as indicated below. The notice of discrepancie, filed on May 5, 2003. The date received has been changed from 5/14/02 to 5/14/03. (bp) [Entry date 06/25/03]

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND DECIDED DECEMBER 12, 2002 AND AMENDED ON APRIL 28, 2003†

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 01-56003, 01-56398

Maria V. ALTMANN, an individual,

Plaintiff-Appellee,

v.

REPUBLIC OF AUSTRIA, a foreign state; and the Austrian Gallery, an agency of the Republic of Austria,

Defendants-Appellants.

Argued March 7, 2002.
Submitted May 24, 2002.
Decided Dec. 12, 2002.

Before: *WARDLAW, W. FLETCHER*, Circuit Judges and *WHYTE*,* District Judge.

WARDLAW, Circuit Judge.

At issue is whether the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, confers jurisdiction in the United

† Amendments appear in brackets [ ].

* The Honorable Ronald M. Whyte, United States District Judge for the Northern District of California, sitting by designation.

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States District Court for the Central District of California over the Republic of Austria and the state-owned Austrian Gallery in a suit alleging wrongful appropriation of six Gustav Klimt paintings from their rightful heirs. Maria Altmann, a United States citizen, seeks the recovery of the paintings from the Republic of Austria, which now houses them in the Austrian Gallery. She alleges that (i) the Nazis took the paintings from her Jewish uncle to "Aryanize" them in violation of international law; (ii) the pre-World War II and wartime Austrian government was complicit in their original takings; (iii) the current government, when it learned of the heirs' rights to the paintings, deceived the heirs as to the circumstances of its acquisition of the paintings; and (iv) the Republic and the Gallery now wrongfully assert ownership over the paintings. The Republic of Austria appeals from the district court's denial of its motion to dismiss for want of jurisdiction. Rejecting the Austrian Republic's assertions, the district court found, *inter alia*, that the FSIA applied retroactively and generally to the events of the late 1930s and 1940s, and that the seizure of the paintings fell within the expropriation exception to the FSIA's grant of immunity.

For the reasons stated below, we determine that the exercise of jurisdiction in this case does not work an impermissible retroactive application of the FSIA. If true, the facts alleged by Altmann establish a taking in violation of international law that confers jurisdiction upon our federal courts, and thus Altmann has presented a substantial and nonfrivolous claim. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992) ("At the jurisdictional stage, we need not decide whether the taking actually violated international law; as long as a 'claim is substantial and nonfrivolous, it provides a sufficient basis for the exercise of our jurisdiction.' " (quoting *West v.*

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Multibanco Comermex, S.A., 807 F.2d 820, 826 (9th Cir. 1987))), *cert. denied*, 507 U.S. 1017, 113 S.Ct. 1812, 123 L.Ed.2d 444 (1993). Because Appellants profit from the Klimt paintings in the United States, by authoring, promoting, and distributing books and other publications exploiting these very paintings, these actions are sufficient to constitute "commercial activity" for the purpose of satisfying the FSIA, as well as the predicates for personal jurisdiction. Finally, because the Republic of Austria "does business" in the Central District of California, venue is appropriate there and the principles of *forum non conveniens* do not counsel otherwise. Thus we uphold the district court's assertion of jurisdiction under the FSIA.

I. Background

In the early 1900s Ferdinand Bloch, a wealthy Czech sugar magnate, commissioned a portrait of his young wife, Adele Bloch-Bauer, by the Austrian painter Gustav Klimt. Adele and Ferdinand, members of the wealthy Viennese intellectual elite, commissioned Klimt's painting at a time when the artist commanded a fee in excess of a quarter of the price of a furnished country villa. Klimt made hundreds of sketches of Adele, culminating in 1907 with the shimmery golden portrait, *Adele Bloch-Bauer I*. Before Adele's untimely passing in 1925, she owned six Klimt paintings, including another portrait of herself, a portrait of a close friend, and three landscapes: *Adele Bloch-Bauer I & II*, *Amalie Zuckerkandl*, *Apple Tree I*, *Beechwood*, and *Houses in Unterach am Attersee*. Obviously oblivious to the terror to come, which would dramatically affect Austria generally and her husband Ferdinand intimately, Adele left a will "kindly" requesting that Ferdinand donate the paintings to the Austrian Gallery upon his death.

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The Nazi invasion of Austria on March 12, 1938, worked a dramatic upheaval on the lives of Ferdinand and all Austrians. Many of the Austrians embraced the Nazis, moving Adolf Hitler to declare the *Anschluss*—the annexation of Austria to Nazi Germany—the next day. To imbue these actions with a quasi-legal basis, a mock Council of Ministers was convened, which adopted the resolution for the *Anschluss*. The legitimate Austrian cabinet leaders were arrested and deported to concentration camps. The country was split into single districts under the direct control of Berlin. Even the name "Austria" was abolished. Ferdinand, who was Jewish and had supported anti-Nazi efforts before the annexation of Austria, fled the country to avoid persecution, leaving behind all his holdings, including his paintings, a valuable porcelain collection, and his beautiful home, castle, and sugar factory. He settled in Zurich, Switzerland.

In the meantime, Nazi officials, accompanied by representatives of what later became the Austrian Gallery, convened a meeting to divide up Ferdinand's property. His sugar company was "Aryanized" and his Vienna home was reduced to a German railway headquarters. Reinhardt Heydrich, the author of the infamous Final Solution, moved into Ferdinand's castle. Ferdinand's vast porcelain collection was sold at a public auction, with the best pieces going to Vienna's museums. Hitler and Hermann Göring confiscated some of Ferdinand's Austrian Masters paintings for their private collections. Others were bought for Hitler's planned museum at Linz. Dr. Erich Fuerher, the Nazi lawyer liquidating the estate, chose a few paintings for his personal collection. Dr. Fuerher purported to give two of the paintings at issue, *Adele Bloch-Bauer I* and *Apple Tree I*, to the Austrian Gallery in 1941, in exchange for a painting donated by Ferdinand in 1936. He accompanied the transaction with a note

claiming to deliver the paintings in fulfillment of the last will and testament of Adele and signed it "Heil Hitler." In March 1943, Dr. Fuerher sold *Adele Bloch-Bauer II* to the Gallery and *Beechwood* to the Museum of the City of Vienna. He kept *Houses in Unterach am Attersee* for his personal collection. It is not clear what immediately happened to *Amalie Zuckerkandl*, although it ended up in the hands of the art dealer Vita Künstler.

Ferdinand died in Switzerland in November 1945. He left a will, revoking all prior wills, and leaving his entire estate to one nephew and two nieces, including Maria Altmann. Like Ferdinand, Altmann and her husband had been forced to flee Austria. When the Nazis invaded Austria, they imprisoned her husband Fritz in the labor camp at Dachau and moved Altmann to a guarded apartment. Her brother-in-law managed to get Fritz released from Dachau, after which they escaped to Holland. Ultimately, they ended up in Hollywood, California, where Altmann became a United States citizen in 1945.

Also in 1945, the Second Republic of Austria was born and the next year, it declared that all transactions motivated by the Nazis were void. Despite this official policy, Altmann and her family members were unsuccessful in recovering the Klimt paintings. Altmann's brother could retrieve only *Houses in Unterach* from the private collection of Dr. Fuehrer. In December 1947, the Museum of the City of Vienna offered to return the painting *Beechwood*, but only in exchange for a refund of the purchase price. This offer was rejected by Ferdinand's heirs. The heirs then unsuccessfully sought return of three of the paintings from the Gallery; the Gallery refused to transfer the paintings, asserting that they had been bequeathed to it by the terms of

Adele's will. Under color of the will, the legal effect of which has yet to be determined,[1] the museum even began to prepare suit for return of the Klimt paintings not yet in its possession. Despite the museum's aggressive stance, a private letter from Dr. Karl Garzarolli dated March 8, 1948, of the Gallery to his Nazi-era predecessor revealed that nothing in the files of the Gallery would document the donation of the paintings to the Gallery. This letter was kept hidden from Ferdinand's heirs.

In 1948, an agent of Austria's Federal Monument Agency contacted Dr. Rinesch, the Austrian lawyer hired by the family, to discuss the artworks in question. He informed Dr. Rinesch that the artworks could not be exported without resolution of their ownership. In a practice later declared illegal by the Austrian government, the Agency informed Dr. Rinesch that it would grant export permits on some of the family's other recovered artworks in exchange for a "donation" of the Klimt paintings. With little hope of otherwise exporting the other artworks, Dr. Rinesch agreed that Ferdinand's heirs would acknowledge the will of Adele Bloch-Bauer and allow the Austrian Gallery to keep the six Klimt paintings mentioned in the will. He justified this decision to Robert Bentley, Altmann's brother, by claiming that Adele's will would be sufficient to give the museum a claim to the six paintings. He executed a document, dated April 12, 1948, acknowledging the agreement and gave *Houses in Unterach* to the Austrian Gallery. As agreed, Dr. Rinesch obtained export permits for almost all of the other recovered artworks.

1. Altmann contends that under both Austrian and American law, precatory language such as that set forth in Adele's last will and testament kindly asking another to bequeath his property is unenforceable and ineffective to dispose of that property. To be effective, the will must contain a command or order as to the disposition of property.

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In early 1998, an international art scandal broke: the City of New York seized two Egon Schiele paintings loaned by Austria to the Museum of Modern Art in New York, claiming that they were stolen by the Nazis. In response to allegations that the Austrian Gallery still possessed looted art, the Austrian Minister for Education and Culture for the first time opened up the Ministry's archives to permit research into the provenance of the national collection. The Austrian government also created a Committee made up of government officials and art historians to advise the Minister for Education and Culture on which artworks should be returned and to whom. The documents that surfaced in 1998 demonstrated that reliance on Adele's will as the source of legal title to the paintings was questionable at best.

Notwithstanding the discovery of the documents undermining the Austrian Gallery's ownership of the paintings, the Committee recommended against returning the six Klimt paintings at issue. Altmann alleges that the Committee vote was predetermined by the Austrian government before the Committee ever discussed the matter. Altmann points to the resignation of one Committee member who abstained from the vote and later stated that she had been ordered by a superior to vote against return of the six paintings.

In September 1999, Altmann decided to file a lawsuit in Austria to overturn the Committee's recommendation regarding the Klimt paintings. To do so, under Austrian law, Altmann was required to pay a filing fee that is a percentage of the recoverable amount. The standard formula used to calculate the court fees is 1.2% of the amount in controversy plus 13,180 Austrian schillings. Because the amount in controversy here is approximately $135 million, Altmann would have been required to pay about $1.6

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million to pursue her claim.[2] Altmann applied for legal aid, seeking reduction of the fees, and was granted a partial waiver. Based on the information detailing her assets, the court determined that Altmann and her co-heirs could afford a fee of 2 million schillings, or approximately $135,000. Although Altmann did not appeal the decision, the Republic of Austria appealed on the grounds that Altmann had not declared the value of various art objects worth almost $700,000 that she had recently recovered from the Austrian government. The petition was rejected as untimely. Regardless of the amount paid, in the event that Altmann prevailed in the Austrian civil action, she would be entitled to recover all of the court fees and her attorney's fees as part of the final judgment.

Because of what they viewed as the prohibitive cost of the lawsuit, Altmann and her family abandoned their Austrian complaint. On August 22, 2000, Altmann filed the present action against the Republic of Austria and the Gallery in the Central District of California. The Republic of Austria and the Gallery moved for dismissal under (i) Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction; (ii) Fed.R.Civ.P. 12(b)(3) for lack of venue; (iii) Fed.R.Civ.P. 12(b)(7) for failure to join indispensable parties; and (iv) the doctrine of *forum non conveniens*. The district court denied this motion on May 4, 2001.

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2. The exchange rate used is from the Declaration of Walter Friedrich in Support of the Republic's Motion to Dismiss and equals 14.7 Austrian schillings per U.S. dollar.

II. Subject Matter Jurisdiction— The Foreign Sovereign Immunities Act

On an appeal from the denial of a motion to dismiss, we review the dismissal de novo, accepting all well-pleaded factual allegations in the complaint as true and making all reasonable inferences in the non-movant's favor. *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001).

A foreign state is normally immune from the jurisdiction of federal and state courts in the United States. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). The United States Supreme Court has long recognized that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *Id.* The FSIA provides a limited means to obtain jurisdiction over foreign sovereigns and their agencies and instrumentalities and codifies a statutory set of exceptions to foreign sovereign immunity. Those exceptions include actions involving waiver of immunity, commercial activity, rights in property taken in violation of international law, rights in property in the United States, tortious acts occurring in the United States, and actions brought to enforce arbitration agreements with a foreign state. 28 U.S.C. § 1605. Thus a federal court cannot hear claims against sovereign nations, unless the claim falls within one of these enumerated exceptions. *Verlinden*, 461 U.S. at 497, 103 S.Ct. 1962.

Altmann contends that the taking of her family's Klimt paintings by the Austrian government violates international law and falls squarely within the expropriation exception to the FSIA. The district court agreed, finding that (i) the FSIA was retroactive

to the pre- and post-war acts of the Nazis and the Austrian government; (ii) personal jurisdiction existed over the Republic and the Gallery; (iii) the doctrine of *forum non conveniens* did not require transfer of jurisdiction to Austria; (iv) all necessary parties had been joined; and (v) venue was appropriate in the Central District of California. *Altmann v. Republic of Austria*, 142 F.Supp.2d 1187 (C.D. Cal. 2001). We turn first to whether the FSIA applies to Altmann's claims.

A. The Applicability of the FSIA

We must first determine whether the district court properly held that the FSIA may be applied to the alleged wrongful appropriation by the Republic. The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The defendants maintain that jurisdiction is lacking because the FSIA may not be retrospectively applied to conduct pre-dating the Department of State's 1952 issuance of the Tate Letter, while the last taking in this case purportedly occurred in 1948. *See* Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman, May 19, 1952 ("1952 Tate Letter"), *reprinted in* 26 Dep't State Bull. 984 (1952) *and in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 app. 2, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). To the extent courts have considered the retroactivity of the FSIA, the consensus appears to be that it would encompass events dating back at least as far as the date of this letter. *See Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2d Cir. 1988); *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986); *Slade v. United States of Mexico*, 617 F.Supp. 351 (D.D.C. 1985).

We need not reach the broad conclusion of the district court that the FSIA may be generally applied to events predating the 1952 Tate Letter. Instead, we find persuasive the reasoning set forth by Judge Wald, who resigned in 1999 from the Court of Appeals for the District of Columbia Circuit to serve two years as a judge on the International Criminal Tribunal for the Former Yugoslavia. In her dissenting opinion in *Princz v. Federal Republic of Germany*, Judge Wald agreed with the majority that application of the FSIA to pre-1952 conduct is not impermissibly retroactive, but set forth a narrower rationale for that conclusion. *See* 26 F.3d 1166, 1178-79 (D.C. Cir. 1994) (Wald, J., dissenting on other grounds), *cert. denied*, 513 U.S. 1121, 115 S.Ct. 923, 130 L.Ed.2d 803 (1995).

The "presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *INS v. St. Cyr*, 533 U.S. 289, 316, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring)). Although Congress is empowered to enact statutes with retrospective effect, a statute may not be applied retroactively "absent a clear indication from Congress that it intended such a result." *Id.* (noting that cases where the Supreme Court has found truly retroactive effect involved statutory language so clear that it could sustain only one interpretation).

A statute does not operate "retrospectively," and thus impermissibly, simply because it applies to conduct antedating the statute's enactment. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). We "must ask whether the new provision attaches new legal consequences

to events completed before its enactment." *Id.* at 269-70, 114 S.Ct. 1483. "[T]he judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *St. Cyr*, 533 U.S. at 321, 121 S.Ct. 2271 (internal quotation marks omitted). We must consider "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483. "[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Id.* at 269, 114 S.Ct. 1483 (quoting *Soc'y for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)). On the other hand, statutes that confer or oust jurisdiction, or change procedural rules, may be applied in suits arising before their enactment without raising concerns about retroactivity. *Id.* at 274-75, 114 S.Ct. 1483. Because these rules "take[ ] away no substantive right but simply change[ ] the tribunal that is to hear the case," present law governs in such situations. *Id.* at 274, 114 S.Ct. 1483 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508, 36 S.Ct. 202, 60 L.Ed. 409 (1916)).

The *Princz* majority found that Congress's intention for the FSIA to be retroactively applied was manifest in the statute's statement of purpose that "claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." *Princz*, 26 F.3d at 1170 (quoting 28 U.S.C. § 1602). The majority interpreted Congress's use of the word "henceforth" to mean that "the FSIA is to be applied to all cases decided after

its enactment, i.e., regardless of when the plaintiff's cause of action accrued." *Id.* The court also pointed out that Congress's deletion of the language in 28 U.S.C. § 1332 providing for diversity jurisdiction over suits by a United States citizen against a foreign government would prevent prospective plaintiffs from suing over pre-enactment acts unless the FSIA's replacement section, 28 U.S.C. § 1330, were available. *Id.* at 1170. Further, the *Princz* majority suggested, as the district court found here, that application of the FSIA to the facts at issue effected merely a change of jurisdiction; thus, because the FSIA did not alter liability under the applicable substantive law, its application would not be impermissibly retroactive. *Id.* at 1170-71; *see also Altmann*, 142 F.Supp.2d at 1200.

Other courts have determined not to apply the FSIA to events predating its enactment. *See Carl Marks*, 841 F.2d 26; *Jackson*, 794 F.2d 1490; *Slade*, 617 F.Supp. 351. Nevertheless, in reaching this conclusion, these courts did not rely solely on the lack of a clear expression of congressional intent; otherwise, they would have concluded that the FSIA could not be applied to events predating its 1976 enactment. Instead, they recognized that the FSIA would properly apply to events occurring after the issuance of the 1952 Tate Letter. *See Carl Marks*, 841 F.2d at 27 ("We believe, as did the district court, that only after 1952 was it reasonable for a foreign sovereign to anticipate being sued in the United States courts on commercial transactions." (alterations and quotation marks omitted)); *Jackson*, 794 F.2d at 1497-98 ("We agree that to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)."); *Slade*, 617 F.Supp. at 356 ("[T]he Court finds that the FSIA cannot be

applied retroactively to this case where all the operative events occurred before 1952."). Although the issuance of the 1952 Tate Letter has been recognized as the moment when "the American position changed and the 'restrictive theory of sovereign immunity' was adopted," for purposes of determining whether Austria could have settled expectations of immunity in a United States court, we note the observation of Judge Re, Chief Judge Emeritus of the Court of International Trade, that it was announced in 1948 that the State Department was reconsidering the policy. Edward D. Re, *Human Rights, Domestic Courts, and Effective Remedies*, 67 St. John's L.Rev. 581, 583-84 (1993).

Assuming, without deciding, that these cases are correct that congressional intent to allow application of the FSIA to pre-enactment facts is not manifest in the statutory language, we turn to the second prong of the *Landgraf* test and examine "whether applying the FSIA would 'impair rights a party possessed when he acted,' " *Princz*, 26 F.3d at 1178 (Wald, J., dissenting on other grounds) (quoting *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483), i.e., whether Austria would have been entitled to immunity for its alleged complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life.

In determining what rights Austria possessed when it acted, and what were its legitimate expectations, we look to the practice of American courts at that time, which was one of judicial deference "to the case-by-case foreign policy determinations of the executive branch." *Id.* at 1178-79 (citing *Verlinden*, 461 U.S. at 486, 103 S.Ct. 1962). We note that in *Verlinden*, the Supreme Court explained that "[u]ntil 1952, the State Department ordinarily requested immunity in all actions against *friendly* foreign

sovereigns." 461 U.S. at 486, 103 S.Ct. 1962 (emphasis added). [This explanation made no distinction between *in rem* and *in personam* actions.] In 1943, the Supreme Court pronounced that "it is of public importance that the action of the political arm of the Government taken within its appropriate sphere be promptly recognized, and that the delay and inconvenience of a prolonged litigation be avoided by prompt termination of the proceedings in the district court." *Ex Parte Peru*, 318 U.S. 578, 587, 63 S.Ct. 793, 87 L.Ed. 1014 (1943). Two years later, the Court exercised *in rem* jurisdiction over a Mexican vessel, noting the absence of a certification of immunity by the State Department or other evidence supporting immunity in conformance with the principles accepted by the State Department. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 34-35, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

Determining whether the FSIA may properly be applied thus turns on the question whether Austria could legitimately expect to receive immunity from the executive branch of the United States for its [alleged] complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings. Mindful that such seizures explicitly violated both Austria's and Germany's obligations under the Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, 1907 U.S.T. LEXIS 29 (entered into force Jan. 26, 1910),[3] and that Austria's Second Republic officially repudiated all Nazi transactions in 1946, we hold that Austria could not expect such immunity.

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3. A number of the treaty's accompanying regulations are directly on point. Article 46 forbids the confiscation of private property, Article 47 forbids pillage, and Article 56 specifically forbids "[a]ll seizure of . . . works of art." 1907 U.S.T. LEXIS 29, at *37, *40.

That Austria and the United States were no longer on opposite sides of World War II at the time the Federal Monument Agency [allegedly] attempted to extort valid title to the Klimt paintings does not mean that Austria could reasonably expect the granting of immunity for an act so closely associated with the atrocities of the War. Although the deprivation of private property, while discriminatory and indeed dehumanizing, pales in comparison with the horrors inflicted upon those who, unlike Ferdinand, were unable to escape the slavery, torture, and mass murder of the Nazi concentration camps, we are certain that the Austrians could not have had any expectation, much less a settled expectation, that the State Department would have recommended immunity as a matter of "grace and comity" for the wrongful appropriation of Jewish property.

Indeed, the State Department's position on that question is evident in an April 13, 1949 letter from Mr. Tate announcing the State Department's adoption of a policy to remove obstacles to recovery specifically for victims of Nazi expropriations. On April 27, 1949, the United States State Department issued a press release stating, in pertinent part:

> As a matter of general interest, the Department publishes herewith a copy of a letter of April 13, 1949 from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 in the United States District Court for the Southern District of New York.
>
> The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the

> countries or peoples subject to their controls; states that *it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property;* and sets forth that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is *to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.*

Press *Release No. 296*, "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," *reprinted in Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam) (emphasis added). The press release was accompanied by a copy of the actual letter, which states in pertinent part:

> 1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls.
>
> * * *
>
> 3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 (S.D.N.Y.), *reprinted in Bernstein*, 210 F.2d at 376. [This letter strongly indicates that the State Department would not have recommended immunity as a matter of grace and comity for Austria's expropriation of the Klimt paintings. Indeed, in January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, warning that

> they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.
>
> Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons . . . resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntary effected.

Dep't St. Bull., Jan. 1943, at 21-22.] We conclude, as did Judge Wald, that the application of the FSIA infringes on no right held

at the time the acts at issue occurred, and thus the FSIA is not impermissibly applied to Austria in this case.

This result is particularly apt for at least three additional reasons. First, we note that by the 1920s, Austria itself had adopted the restrictive theory, which recognizes sovereign immunity "with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." 1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 711, 96 S.Ct. 1854; *see also* Joseph M. Sweeney, The International Law of Sovereign Immunity 30 (U.S. Dep't of State Policy Research Study, 1963) ("At the end of World War I, the courts of Austria abandoned the absolute concept [of sovereign immunity] and adopted the restrictive concept."). As the Tate Letter of May 19 describes:

> The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 713, 96 S.Ct. 1854. Thus Austria could have had no reasonable expectation of immunity in a foreign court. As Judge Wald notes, the 1945-46 Nuremberg trials signaled "that the international community, and particularly the United States . . . would not have supported a broad enough immunity to shroud the atrocities

committed during the Holocaust." *Princz*, 26 F.3d at 1179 (Wald, J., dissenting on other grounds). Because a United States court would apply the international law of takings, which presumably would be applied in any foreign court, the application of the FSIA to the facts of this case "merely address[es] *which* court shall have jurisdiction" and thus "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (emphasis in original) (citing *Landgraf*, 511 U.S. at 275, 114 S.Ct. 1483). Because such application would "affect only *where* a suit may be brought, not *whether* it may be brought at all," *id.* (emphasis in original), the application of the FSIA to the facts of this case is not impermissibly retroactive.

Second, the cases holding the FSIA inapplicable to pre-1952 events involve economic transactions entered into long before the facts of this case arose and, unlike here, prior to the defendant country's acceptance of the restrictive principle of sovereign immunity and to the widespread acceptance of the restrictive theory. The Soviet Union, which was sued in *Carl Marks* over its default with respect to debt instruments issued in 1916, *see* 841 F.2d at 26, was in 1952, together with the Soviet satellite countries and the United Kingdom, one of the few remaining jurisdictions that supported "continued full acceptance of the absolute theory of sovereign immunity." 1952 Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 715, 96 S.Ct. 1854. The 1952 Tate Letter also noted that China, sued in *Jackson* over its default on bonds issued in 1911, *see* 794 F.2d at 1491, was among the jurisdictions not yet having clearly adopted the restrictive principle. 1952 Tate Letter,

reprinted in Alfred Dunhill, 425 U.S. at 712, 96 S.Ct. 1854. As for Mexico, sued in *Slade* over its default over a 1922 interest agreement, *see* 617 F.Supp. 351, it is well-known that Latin-American nations did not accept the restrictive approach to immunity well into the 1980s. *See* Wang Houli, *Sovereign Immunity: Chinese Views and Practices*, J. Chinese L., Spring 1987, at 22, 27.

Third, the disputes in *Carl Marks*, *Jackson*, and *Slade* essentially involved contracts, an area in which courts have traditionally deferred to the "settled expectations" of the parties at the time of contracting in recognition of the parties' allocation of risk. Such deference is especially due in financial transactions involving foreign debt instruments, where unexpected judicial intrusion essentially would re-write the parties' original bargain. Such presumptions are inapplicable in the context of a claim like the international takings violation at issue here. Thus, even if Austria had indeed expected not to be sued in a foreign court at the time it acted, an expectation which we have explained would be patently unreasonable, such expectation would be due no deference.

For these reasons, we hold that application of the FSIA to the pre-1952 actions of the Republic of Austria is not impermissibly retroactive.

B. Expropriation Exception to Sovereign Immunity

The FSIA's expropriation exception to immunity provides that:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. . . .

28 U.S.C. § 1605(a). This exception to foreign sovereign immunity "is based upon the general presumption that states abide by international law and, hence, violations of international law are not 'sovereign' acts." *West*, 807 F.2d at 826; H.R.Rep. No. 94-1487, at 14, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613 ("[T]he central premise of the bill [is that] decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law."); *see also Trajano v. Marcos (In re Estate of Marcos Human Rights Litig.)*, 978 F.2d 493, 497-98 (9th Cir. 1992) ("Congress intended the FSIA to be consistent with international law. . . ."). For guidance regarding the norms against takings in violation of international law, we may look to court decisions, United States law, the work of jurists, and the usage of nations. *See Siderman de Blake*, 965 F.2d at 714-15; *West*, 807 F.2d at 831 n. 10. Nevertheless, we recognize that "[a]t the jurisdictional stage, we need not

decide whether the taking actually violated international law; as long as a 'claim is substantial and non-frivolous, it provides a sufficient basis for the exercise of our jurisdiction.' " *Siderman de Blake*, 965 F.2d at 711 (quoting *West*, 807 F.2d at 826).

The facts alleged by Altmann fall squarely within the expropriation exception to sovereign immunity. There is no question but that "rights in property" are in issue. The Austrian Republic and Gallery insist on Adele's will as the basis for their legal ownership of the Klimt paintings. Altmann, as a true heir and as a representative of other heirs, asserts the will has no such legal effect and the documents unearthed in 1998 revealed that fact to the current Austrian government and to the Austrian Gallery, which nevertheless have retained possession of the paintings without payment therefor.

The next question is whether the property in issue was taken in violation of international law. To constitute a valid taking under international law three predicates must exist. First, "[v]alid expropriations must always serve a public purpose." *West*, 807 F.2d at 831. Second, "aliens [must] not be discriminated against or singled out for regulation by the state." *Id.* at 832. Finally, "[a]n otherwise valid taking is illegal without the payment of just compensation." *Id.* (relying on reports from the Foreign Claims Settlement Commission, international law journals, the *Restatement (Second) of Foreign Relations Law of the United States*, and federal case law). To fall into this exception, the plaintiff cannot be a citizen of the defendant country at the time of the expropriation, because " '[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.' " *Siderman de Blake*, 965 F.2d at 711 (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990)).

The facts of record, which in this procedural posture we must take as true, show that the Klimt paintings have been wrongfully and discriminatorily appropriated in violation of international law. The Nazis did not even pretend to take the Klimt paintings for a public purpose; instead, Dr. Fuehrer sold them for personal gain or exchanged them to supplement his private collection. In addition, their taking appears discriminatory. Altmann is a Jewish refugee, now a United States citizen, who is a descendant of a Czech family whose property was looted by the Nazis because of their religious heritage. According to Altmann, despite convening a Committee to evaluate expropriation claims and return stolen artwork, the Austrian government intentionally intervened to thwart a fair and impartial vote on the restitution of the Klimt paintings. Further, the Austrian government has not yet returned the paintings to Altmann and her family or justly compensated them for the value of the paintings.[4] Without compensation, this taking cannot be valid. *See West*, 807 F.2d at 832.

Finally, the Austrian Gallery is engaged in commercial activity in the United States. Altmann has satisfied the FSIA's statutory nexus requirement by showing that the paintings are owned or operated by an agency or instrumentality of the foreign state, here the Austrian Gallery, which is "engaged in commercial activity in the United States." 28 U.S.C. § 1605(a)(3). The defendants

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4. Austria now claims the Altmann family itself later donated the paintings in exchange for export permits on other artwork returned to the family after World War II. Altmann argues this practice was illegal, as the Austrian government later found, and thus any purported "donation" was legally void. Because this dispute is a mixed factual and legal question, it cannot be resolved on appeal and is best left for the trial court.

do not contest that the Gallery is an "agency or instrumentality." The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* at § 1603(d).

Altmann argues that the Gallery engages in commercial activity in the United States by authoring, editing, and publishing in the United States both a book entitled *Klimt's Women*, as well as an English-language guidebook, containing photographs of the looted paintings.[5] She also contends that the advertisements in the United States of Gallery exhibitions, particularly those relating to the Klimt paintings, as well as operation of the Gallery itself, constitute commercial activity. The key commercial behavior of the Gallery here is not its operation of the museum exhibition in Austria, however, but its publication and marketing of that exhibition and the books in the United States. *Klimt's Women*, for example, is published in English in the United States by Yale University Press and capitalizes on the images of three of the paintings at issue. That book was published in conjunction with a large exhibition at the Gallery featuring the expropriated paintings. Furthermore, the Austrian Gallery asserts copyright ownership as "authors"; two employees of the Gallery edited

5. ***See*** Appendix A, cover page of the Austrian Gallery English language guidebook; Appendix B, excerpts from *Gustav Klimt in the Austrian Gallery Belvedere*, authored by Gerbert Frodl, the director of the Austrian Gallery; Appendix C, excerpts from *Klimt's Women*, edited by Tobias Natter, the curator of twentieth century art at the Austrian Gallery, and Gerbert Frodl; and Appendix D, cover page of *Austrian Information*, July/August 2000, published by the Austrian Press and Information Service.

the book; and the director of the Gallery is listed as responsible for its content. The museum guidebook is also published in English and features the painting *Adele Bloch-Bauer I* on its cover. The publication and sale of these materials and the marketing of the Klimt exhibition in the United States are commercial activities in and of themselves, but are also a means to attract American tourists to the Gallery. Given that the commercial activity is centered around the very paintings at issue in this action and far exceeds that which we found sufficient to justify applying § 1605(a)(3) in *Siderman de Blake*, 965 F.2d at 709, we must conclude that the Gallery is engaging in commercial activity sufficient to justify jurisdiction under the FSIA.

III. Due Process and Personal Jurisdiction

Austria maintains that even if an exception to sovereign immunity applies, Altmann's suit cannot be maintained unless the district court has personal jurisdiction over the Republic and the Gallery. Under the FSIA, however, personal jurisdiction over a foreign state exists where subject-matter jurisdiction exists and where proper service has been made. 28 U.S.C. § 1330(b). Because we hold that the paintings are subject to the expropriation exception of the FSIA, and there has been proper service of process under § 1608, as the Republic concedes, the court has personal jurisdiction over the Republic and the Gallery.

We also hold that, if the facts are as Altmann alleges, the assertion of personal jurisdiction over the Republic and the Gallery complies with the Due Process Clause of the Fifth Amendment. Assuming that a foreign state is a "person" for purposes of the Due Process Clause, *Republic of Argentina v. Weltover*, 504 U.S. 607, 619, 112 S.Ct. 2160, 119 L.Ed.2d

394 (1992), there must be sufficient "minimum contacts" between the foreign state and the forum "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice," *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (citation omitted). *See also Theo. H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969, 974 & n. 3 (9th Cir. 1999) ("[W]e need not decide whether [the government agency] is a 'person' for purposes of the Due Process Clause. We simply assume, without deciding, that both are."). "Factors to be taken into consideration are whether the defendant makes sales, solicits or engages in business in the state, serves the state's markets, designates an agent for service of process, holds a license, or is incorporated there." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 418, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). "Where service is made under FSIA section 1608, the relevant area in delineating contacts is in the entire United States, not merely the forum state." *Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1447 (9th Cir. 1991) (internal quotation marks and alterations omitted).

The Republic and the Gallery have sufficient minimum contacts with the United States such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. As previously noted, the Gallery edits and publishes several publications in the United States, two of which capitalize on the very paintings at issue here. The Gallery's publication and marketing of these books is designed to solicit tourism by United States citizens in Austria and to attract those visitors to the Gallery, in particular to view the Klimt works. Both the Republic and the Gallery profit from the sales of the books and the resulting United States tourism.

Furthermore, it is not only the Gallery's activities in the forum, but also actions taken by the Government on behalf of the Gallery that support personal jurisdiction. *See Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981). The Austrian Press and Information Service of the Austrian Embassy has published a tourism brochure advertising the Klimt exhibition at the Austrian Gallery and featuring the portrait of Adele Bloch-Bauer on its cover. This brochure is available at Austrian consulates throughout the United States, distributed to a large mailing list of individuals in the United States, and is widely available on the Internet. The advertisement and promotion of this exhibition directly benefit the Gallery.

The Republic itself does not contest that it has substantial, systematic, and continuous contacts with the United States through its operation of consulates, sponsorship of tourist relations and trade, and promotion of Austrian business interests. The Republic alone operates three consulates in the United States and twenty-six honorary consulates in the United States and its territories.[6] The Austrian Trade Commission and Austrian National Tourist Offices operate in both New York and Los Angeles. Austria also recently invested $400,000 in the renovation of the Rudolf Schindler house, a historic architectural landmark in Los Angeles. Thus Altmann has established "continuous and systematic contacts." *Helicopteros*, 466 U.S. at 414-16 & nn. 8-9, 104

6. ***See*** Austrian Press and Information Service, *Austrian Offices in the United States*, *at* <http: //www.austria.org/govoff.htm# congen>. In addition to the Consulates General in New York City, Los Angeles, and Chicago, honorary consulates exist in Anchorage, Atlanta, Boston, Buffalo, Charlotte, Columbus, Denver, Detroit, Honolulu, Houston, Kansas City, Miami, Milwaukee, Nassau, New Orleans, Philadelphia, Pittsburgh, Portland, Richmond, St. Louis, St. Paul, St. Thomas, San Francisco, San Juan, Seattle, and Warwick.

S.Ct. 1868; *Siderman de Blake*, 965 F.2d at 709-10 (finding jurisdiction where hotel solicited United States tourism and accepted United States credit cards for payment for guest reservations). We do not hold that these contacts are enough to support general jurisdiction, but they support the reasonableness of the assertion of specific jurisdiction based on the Gallery's publication of books and advertisements featuring the Klimt works. We conclude that fair play and substantial justice would not be offended if we maintain jurisdiction over Austria in this case.

IV. Joinder of Parties

We reject Austria's contention that Altmann's co-heirs are necessary parties to the litigation requiring dismissal of this action under *Rule 19* unless they are joined. *See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir.), *cert. denied*, __ U.S. __, 123 S.Ct. 98, 154 L.Ed.2d 27 (2002). In determining whether the co-heirs are necessary parties under Rule 19, we consider whether, in the absence of their joinder, complete relief can be accorded to Altmann. *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). In the alternative, we consider whether the co-heirs can claim a legally protected interest in the subject of the suit such that a decision in their absence will (1) impair or impede their ability to protect that interest; or (2) expose the Republic of Austria and Altmann to the risk of multiple or inconsistent obligations by reason of that interest. *See* Fed.R.Civ.P. 19(a)(2); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999). Joinder is "contingent . . . upon an initial requirement that the absent party *claim* a legally protected interest relating to the subject matter of the action." *Northrop Corp. v. McDonnell*

Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983) (emphasis added). Where a party is aware of an action and chooses not to claim an interest, the district court does not err by holding that joinder was "unnecessary." *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999).

Although Altmann is an heir to only twenty-five percent of her uncle's estate, her relatives have assigned to her an additional fifty percent of their interest in the estate for purposes of this suit. Another relative, Altmann's cousin, who holds the remaining twenty-five percent interest in the estate does not live in the United States and is aware of the litigation. Given that all necessary parties are aware of the litigation and have chosen not to claim an interest, joinder of these parties is unnecessary to this suit. *See id.* (holding that the district court did not err by finding that a party who was aware of an action but chose not to claim an interest was not a necessary party under Rule 19).

V. Venue

The Republic and the Gallery also appeal the district court's denial of their motion to dismiss for improper venue. Relying on 28 U.S.C. § 1391(f)(3), the district court found that venue was appropriate in the Central District of California because it is a "judicial district in which the agency or instrumentality is licensed to do business or is doing business." The district court found "no authority that suggests that a foreign agency or instrumentality that engages in 'commercial activity' within a district is not also 'doing business' within a district." *Altmann*, 142 F.Supp.2d at 1215.

We agree with the district court that venue is appropriate in the Central District. Section 1391(f)(3) authorizes venue in any judicial district in which an agency or instrumentality of a foreign state is "doing business" if the agency or instrumentality is sued, and § 1391(f)(4) authorizes venue in the federal district court for the District of Columbia if the foreign state itself is sued. We do not read the statute to require that (f)(3) be the exclusive basis on which venue is available when an agency or instrumentality of the foreign state is sued, or that (f)(4) be the exclusive basis when a foreign state is sued. Sections (f)(3) and (f)(4) are alternative venue provisions, separated by the word "or." Where, as here, both the foreign state and its instrumentality are sued in the same suit, both venue provisions are potentially available. Because the publications and advertisements of the Austrian Gallery that form the basis for jurisdiction under the FSIA have been distributed in the Central District of California, we hold that the Austrian Gallery, an agency or instrumentality of Austria, is "doing business" in the district and that venue is therefore proper in the Central District under § 1391(f)(3). (We also note that an Austrian Consulate is located on Wilshire Boulevard in Los Angeles, a short distance from the federal courthouse; that diplomatic representatives of Austria work in the Central District; and that Altmann, now 86 years old, would be forced to travel to Washington, D.C. to pursue this action, significantly outweighing any inconvenience potentially experienced by the Republic of Austria.)

VI. Forum Non Conveniens

Finally, we hold that the district court did not err in denying Austria's motion to dismiss the action based on the doctrine of *forum non conveniens*. A district court may decline to exercise

its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-50, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). Because this determination is committed to the sound discretion of the district court, Austria faces an uphill battle in persuading us that the district court abused its discretion by denying Austria's motion. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1409 (9th Cir. 1983); *see also Leetsch v. Freedman*, 260 F.3d 1100, 1102-03 (9th Cir. 2001) (Where the court has considered the availability of an adequate alternative forum, and where it has considered and reasonably balanced all relevant public and private interest factors, its decision deserves substantial deference.).

Altmann contends that Austria cannot meet its threshold burden of providing an adequate alternative forum. The district court agreed, finding that because the Austrian filing fees are so oppressively burdensome and Altmann's claims will likely be barred by the thirty-year statute of limitations under Austrian law, these factors render the Austrian courts unavailable.

We disagree that the cost of the lawsuit in Austria, alone, makes this forum unavailable. The mere existence of filing fees, which are required in many civil law countries, does not render a forum inadequate as a matter of law. *See, e.g., Nai-Chao v. Boeing Co.*, 555 F.Supp. 9, 16 (N.D. Cal. 1982) (holding that despite filing fees amounting to one percent of claim and an additional one-half percent for each appeal, Taiwan was an adequate forum), *aff'd sub nom, Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir.), *cert. denied*, 464 U.S. 1017, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983); *see also Mercier v. Sheraton*

Int'l, Inc., 981 F.2d 1345, 1353 (1st Cir. 1992), *cert. denied*, 508 U.S. 912, 113 S.Ct. 2346, 124 L.Ed.2d 255 (1993) (fifteen percent Turkish bond would not prohibit court from finding Turkey adequate forum); *Murray v. BBC*, 81 F.3d 287, 292-93 (2d Cir. 1996) (England was an adequate forum despite the plaintiff's claim that the American contingency fee system was the only way he could afford a lawyer). Altmann and her co-plaintiffs received significant legal aid based on her petition to the court for a reduction of fees. She did not appeal to further reduce these fees; nor did she apply for an extension of the term of payment of the court fees. Finally, it appears that the fee application was made without calculating the present value of Altmann's home or taking into account the value of a number of porcelain pieces returned by the Austrian government. Arguably, Altmann has greater assets available to her than she listed in her application to the court. Thus the Austrian filing fees are not a basis for finding an inadequate forum.

Nor are we convinced that Austria's statute of limitations bars Altmann's action in that forum. Although Altmann is correct that a thirty-year statute of limitations generally applies to civil claims in Austria, under Austrian law, acts of fraudulent concealment toll the statute. Moreover, the statute of limitations does not prevent Altmann from basing her claims on the 1998 Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections. This legislation "authorizes the Minister of Finance to return artworks in special instances enumerated in the States where claims could otherwise not be made," including the expiration of a statute of limitations.

Nevertheless, our conclusions with respect to the filing fees and the statute of limitations do not compel us to dismiss the

complaint on the grounds of *forum non conveniens*. Altmann's choice of forum should not be disturbed unless, when weighing the convenience of the parties and the interests of justice, "the balance is strongly in favor of the defendant." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). To make this determination, we consider both the "private interest" factors affecting the convenience of the litigants, including all "practical problems that make trial of a case easy, expeditious and inexpensive" as well as the "public interest" factors affecting the convenience of the forum, which include the administrative difficulties flowing from court congestion; the local interest in having localized controversies resolved at home; the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-09, 67 S.Ct. 839.

Austria claims that the private and public interest factors weigh in favor of conducting a trial in Austria. It argues that the evidentiary sources, the witnesses, and the paintings are all located in Austria and a United States district court would be required to apply Austrian law. We do not agree that these factors outweigh Altmann's choice of forum. Maria Altmann is an elderly United States citizen, who has resided in this country for over sixty years. The requisite foreign travel, coupled with the significant costs of litigating this case in Austria, weigh heavily in favor of retaining jurisdiction in the United States. Because of the discrete issues presented, this case alone is unlikely to cause much congestion in the courts. Finally, Austria has not set forth any potential conflicts of law beyond the statute of limitations, which it concedes is tolled for fraudulent concealment, as in the

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United States. Because the Republic of Austria has not made a "clear showing of facts which either (1) establish such oppression and vexation of a defendant as to be out of proportion to the plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems," *Cheng*, 708 F.2d at 1410 (internal quotation marks omitted), we uphold the findings of the district court as to *forum non conveniens*.

VII. Conclusion

Maria Altmann has alleged sufficient facts which, if proven, would demonstrate that the Klimt paintings were taken in violation of international law. At least as to the Republic of Austria and the national Austrian Gallery, applying the FSIA to the takings of these paintings in the 1930s and 1940s is not an impermissible retroactive application of the Act. Because the remainder of the Act's and other jurisdictional prerequisites are met, the district court properly exercised jurisdiction over Altmann's claims.

AFFIRMED and REMANDED for further proceedings.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED AND FILED MAY 4, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 00-8913 FMC (AIJx)

MARIA V. ALTMANN,

Plaintiff,

vs.

REPUBLIC OF AUSTRIA, et al.

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS; ORDER GRANTING LEAVE TO AMEND COMPLAINT

Plaintiff is the niece and heir of Adele Bloch-Bauer who was a model for, and whose husband was the owner of, works of art painted by Gustav Klimt. Plaintiff brings this action to recover six Klimt paintings which were stolen by the Nazis and are presently in the possession of Defendants. By this Order, the Court concludes that it has jurisdiction over defendants by virtue of an immunity exception contained in the Foreign Sovereign Immunities Act.

Appendix D

This matter is before the Court on the Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, under Rule 12(b)(6) for failure to state a claim upon which relief may be granted,[1] under 12(b)(3) for lack of venue, under Rule 12(b)(7) for failure to join indispensable parties, and under the doctrine of *forum non conveniens*. For the reasons stated herein, the Defendants' Motion is **DENIED.**

I. Background

A. Factual Allegations of Complaint

1. The Nature of the Dispute

The present dispute centers on ownership rights to six paintings by the world-renowned artist, Gustav Klimt. Specifically, at issue in the current action are six paintings with the following titles: *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Beechwood*, *Apple Tree I*, *Houses in Unterach am Attersee*, and *Amalie Zuckerkandl* (collectively, "the paintings").[2] The paintings are currently in the possession of

1. Defendants' Rule 12(b)(6) motion was based on the act of state doctrine. Defendants have since withdrawn this motion.

2. The paintings at issue are valued at approximately $150 million. It appears that these paintings are significant works of art in the Gallery's collection. All the paintings, with the exception of *Amalie Zuckerkandl*, have been displayed in the Gallery within the last two years. *Adele Bloch-Bauer I* appears on the cover of the Gallery's guidebook, and *Adele Bloch-Bauer I*, *Adele Bloch-*

(Cont'd)

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the Republic of Austria ("the Republic") and/or the Austrian Gallery ("the Gallery").[3] Plaintiff seeks recovery of these paintings that were owned by her family before they were stolen by the Nazis in the early 1940s in Austria.[4]

2. Events in Pre-World War II Austria

The paintings at issue were owned by Ferdinand Bloch-Bauer, Plaintiff's uncle. Plaintiff's aunt, Ferdinand's wife, Adele Bloch-Bauer, died in 1925. When Adele died, she left a will asking that her husband consider donating six paintings

(Cont'd)

Bauer II, and *Amalie Zuckerkandl* appear in a book entitled *Klimt's Women* that is edited by Gallery employees and distributed in the United States by Yale University Press. These three paintings were also featured in an exposition entitled "*Gustav Klimt: Portraits of European Women*" that was held from September 20, 2000, to January 7, 2001, in Vienna.

3. Collectively, the Republic and the Gallery are referred to as "Defendants" or "Austria".

4. Plaintiff is Jewish. She and her family suffered persecution under the Nazi regime in Austria and ultimately fled the country.

Prior to 1938, Austria was an independent democratic republic. In 1938, the Nazis invaded Austria ("the Anschluss") and claimed Austria as a part of Germany. Almost immediately after the invasion, the Nazis enacted anti-Jewish laws and regulations that severely restricted the property rights of those of Jewish descent. Businesses and property belonging to Jews was "aryanized," i.e., given to non-Jewish individuals whose loyalty belonged to the Nazi party.

to the Austrian Gallery on his death.[5] When the will was probated, the paintings were found to be part of Ferdinand's property, not Adele's. Ferdinand stated in 1926 that he intended to donate the paintings in accordance with his wife's wishes, but did not ever do so. Ferdinand donated one painting to the Gallery in 1936, a painting by Gustav Klimt entitled *Schloss Kammer am Attersee III.*

3. Plaintiff's Escape to the United States

Plaintiff was married shortly before the Nazi's annexation of Austria in 1938. Plaintiff and her husband escaped Austria to the Netherlands, to Britain, and finally to the United States. In 1942, Plaintiff arrived in Los Angeles, where she has lived since that time. Plaintiff became a naturalized citizen in 1945.

4. Ferdinand and His Artwork — The Nazi Occupation of Austria

Ferdinand left Austria in 1938; the Nazis took his home, his business, and his artwork. Four hundred pieces of porcelain were sold at public auction. Several Nineteenth century Austrian paintings went to Adolph Hitler's and

5. The six paintings addressed in Adele's will are *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, *Beechwood*, *Apple Tree I*, *Houses in Unterach am Attersee*, and *Schloss Kammer am Attersee III.* The portrait of Amalie Zuckerkandl, which is also at issue in this action, was not among those mentioned in Adele's will. Conversely, *Schloss Kammer am Attersee III*, which was mentioned in Adele's will, is not at issue in this action because Ferdinand donated it to the Gallery in 1936.

Herman Göring's private collections. Dr. Erich Führer, a Nazi lawyer in charge of liquidating Ferdinand's collection, also benefitted.

The paintings at issue in the present suit were transferred in various ways:

Adele Bloch-Bauer I and *Apple Tree I* were traded in 1941 to the Austrian Gallery for *Schloss Kammer am Attersee III.*[6] *Adele Bloch-Bauer I* appears on the cover of the Gallery's official guidebook of the museum.

Beechwood was sold in November 1942 to the Museum of the City of Vienna. In 1947, the Museum offered to return the painting to Plaintiff and Ferdinand's other heirs (collectively, "the heirs") in exchange for refund of the purchase price. The painting was, in the late 1940s, transferred to the Gallery with the assistance of the heirs' lawyer.

Adele Bloch-Bauer II was sold in March 1943 to the Austrian Gallery.

Houses in Unterach am Attersee was kept by Dr. Führer for his personal collection. This painting was later retrieved from that collection by Plaintiff's brother. It was in possession of the heirs' Austrian lawyer in late 1940s and was returned to the Gallery in exchange for export licenses for other works of art.

6. *Schloss Kammer am Attersee III* was later sold to Gustav Klimt's son. In 1961, this painting was donated to the Gallery.

The original disposition of *Amalie Zuckerkandl*[7] is not known; the painting eventually turned up in the hands of art dealer Vita Künstler, who donated it to the Gallery in 1988.

5. After the War

Ferdinand died just a few months after the war in Europe ended, but he took preliminary steps to retrieve his stolen property. Ferdinand made no bequest in his will to the Austrian Gallery.

In 1946, the Republic enacted a law declaring that all transactions that were motivated by discriminatory Nazi ideology were to be deemed null and void; however, the Republic often required the original owners of such property, including works of art, to repay to the purchaser the purchase price before an item would be returned.

Austrian law also prohibited the export of artworks that were deemed to be important to Austria's cultural heritage. It was the policy after the war to use the export license law to force Jews who sought export of artworks to trade artworks for export permits on other works.

6. Ferdinand's Heirs' Attempts to Secure the Paintings After the War

In 1947, a Swiss court recognized Plaintiff as the heir to 25% of Ferdinand's estate. The heirs retained an Austrian

7. Another Austrian family has asserted ownership rights to this painting as well.

lawyer to attempt to secure return of Ferdinand's property. Plaintiff's older brother was a captain in the Allied Forces, and he personally recovered *Houses in Unterach am Attersee* from Dr. Führer's private collection. The painting was kept in his or his lawyer's apartment in Vienna pending permission to export the painting.

In February 1948, the Austrian lawyer sought return of *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, and *Apple Tree I* from the Gallery. The Gallery asserted that five of the six paintings at issue were bequeathed to it by the will of Adele Bloch-Bauer in 1926, and that Ferdinand was merely granted permission to keep the paintings during his lifetime. The Gallery demanded the heirs return the remaining paintings to it.

7. The Museum's Actions In Protecting Its Collection

In March 1948, Dr. Garzarolli of the Austrian Gallery learned of the contents and probate proceedings of Adele's will. Specifically, Garzarolli learned that Adele had expressed the wish that Ferdinand donate the paintings to the Gallery, but that Adele had not herself bequeathed the paintings to the Gallery. Garzarolli acknowledged as much in a March 8, 1948, letter to his predecessor wherein Garzarolli expressed his concern at his predecessor's failure to obtain a declaration of gift in favor of the state from Ferdinand.[8] Dr. Garzarolli

8. An excerpt of this letter is set forth in ¶ 42 of the Complaint:

> Because there is no mention of these facts [the purported donation of the Klimt paintings by Adele or Ferdinand]

(Cont'd)

did not reveal to the heirs or their lawyers the files from Adele's probate proceedings that he had in his possession; rather, he prepared to sue the heirs for the remaining paintings.

8. The Exchange—Donations for Export Licenses

In late March 1948, Gallery officials reviewed the artwork in the apartment belonging to Plaintiff's brother or his lawyer to determine whether an export license could be granted. The officials recognized the pieces as part of Ferdinand's collection. Dr. Garzarolli sought the assistance of the Austrian Attorney General in obtaining possession of the remaining three paintings.

(Cont'd)

> in the available files of the Austrian Gallery, i.e., neither a court-authorized nor a notarized or other personal declaration of Ferdinand Bloch-Bauer exists, which in my opinion you certainly should have obtained, I find myself in an extremely difficult situation. . . . I cannot understand why even during the Nazi era an incontestable declaration of gift in favor of the state was never obtained from Ferdinand Bloch-Bauer. . . .
>
> In any case, the situation is growing into a sea snake . . . I am very concerned that up until now all of the cases of restitution have brought with them immense confusion. In my opinion it would be also in your interest to stick by me while this is sorted out. Perhaps that way we will best come out of this not exactly danger-free situation.

In early April, Dr. Garzarolli wrote to Dr. Otto Demus, president of the Federal Monument Agency (the agency in charge of the export licenses), and suggested that the processing of export permits for Ferdinand's collection be delayed "for tactical reasons." Dr. Demus met with the heirs' lawyer regarding the artwork already in Austria and other items of artwork belonging to Ferdinand to be returned to Austria by the Allied forces. The lawyer understood from Dr. Demus that "donations" to the Gallery would have to occur in order to procure export licenses for any of Ferdinand's collection.

The lawyer, on behalf of the heirs,[9] agreed to "donate" the Klimt paintings in exchange for permits on the remaining items. The lawyer learned the contents of Adele's will, but thought Ferdinand's expressed intention to donate the Klimt paintings would be binding. The lawyer executed a document purporting to acknowledge the intention to donate the paintings expressed in Adele's will. The lawyer gave the Gallery *Houses in Unterach am Attersee* on April 12, 1948.

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9. Plaintiff was unaware of the attorney's actions until 1999. She did not authorize the attorney to negotiate on her behalf, nor did she authorize "donating" the paintings to the Gallery. Until 1999, Plaintiff believed that her family had donated the paintings to the Gallery. The Gallery's misrepresentations to the attorney were relayed to her brother, who later relayed them to her.

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9. 1998 Discovery by Austrian Journalist

In 1998, after the seizure of two paintings by Egon Schiele in New York,[10] the Austrian federal minister opened up the Gallery's archives to permit researchers to prove that no looted artworks remained in Austria. Thereafter, an Austrian journalist, Hubertus Czernin, published a series of articles exposing the fact that Austria's federal museums had profited greatly from exiled Jewish families after the war.[11]

10. The painting *Portrait of Wally* by Egon Schiele was taken from its owner in Nazi-occupied Austria. *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000). At the end of World War II, the painting was recovered by Allied Forces and was returned to Austria to be returned to its rightful owner. *Id.* The painting was not ever returned to its owner. *Id.* In 2000, the painting, while on loan to the Museum of Modern Art in New York City, was seized pursuant to a seizure order issued by a United States magistrate judge pending proceedings under the National Stolen Property Act ("NSPA"), 18 U.S.C. § 2314, which prohibits transporting stolen goods in foreign commerce. *Id.* The court held that the painting could not be considered "stolen" under the NSPA once it was recovered by Allied Forces because the Allied Forces would be considered the owner's "agent" for purposes of the NSPA.

11. In January 1999, the Austrian government permitted Czernin to copy documents from the Gallery archives. Czernin provided copies of these documents to Plaintiff's lawyer, and Plaintiff learned how the Klimt paintings came to be in the possession of the Austrian Gallery.

California law recognizes that owners of stolen works of art are often unable immediately to file a cause of action for its recovery. *See Society of California Pioneers v. Baker*, 43 Cal. App. 4th 774, 50 Cal. Rptr. 2d 865 (1996); Cal.Code Civ. P. § 338 (establishing a three year statute of limitations that accrues upon the discovery of the whereabouts of a stolen article of artistic significance).

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Adele Bloch-Bauer I, reported by the Gallery as being donated to the Gallery in 1936, was revealed to have been transferred to the museum in 1941 with a letter from Dr. Führer signed "Heil Hitler." The archives were closed, but government research essentially confirmed Czernin's stories.

10. New Law Favoring Return of Artwork Stolen by Nazis

In response, in September 1998, a new restitution law was proposed in Austria, designed to return artworks that had been donated to federal museums under duress in exchange for export permits. The law was enacted in December.

A committee of government officials and art historians was formed by the new law, and in February 1999, the committee recommended that hundreds of artworks be returned to their rightful owners. In response to inquiries from the Austrian parliament, Minister Gehrer, Austria's federal minister of education and culture, concluded that there was an evident connection between the donation of the Klimt paintings and the export permit law.

There was political opposition to the return of the Klimt paintings. The committee received an incomplete report regarding the Klimts, and some members did not receive an expert's opinion regarding the invalidity of the purported bequest to the Gallery. On June 28, 1999, the committee met and affirmed a recommendation that the Klimts not be returned. The vote on the return of the paintings was predetermined, and one member of the committee eventually

resigned in protest. The committee did vote to return 16 Klimt drawings and 19 porcelain settings previously donated by the family in exchange for export permits.

Plaintiff protested the committee's decision and requested arbitration. The Republic rejected this approach, suggesting that the heirs' only remedy was to go to court.

11. Attempt at Austrian Judicial Intervention

In September 1999, Plaintiff announced she would file a lawsuit regarding the paintings. However, the court costs associated with bringing such a suit in Austria are determined by the amount in controversy. Plaintiff would have to pay a filing fee of approximately two million Austrian Schillings[12] for the privilege of suing the Republic and the Gallery even after obtaining a partial waiver of court costs. The Austrian Court noted the amount of Plaintiff's assets and suggested that Plaintiff should spend all of her liquid assets in furtherance of her claim because the alternative would be to charge the court costs to the Austrian public.

12. The current exchange rate of Austrian Schillings to United States Dollars is approximately 15:1. In today's terms the filing fee would be approximately $133,000. In October 1999, when Plaintiff filed her request for assistance, the Austrian Schilling was stronger against the United States dollar, so the filing fee was slightly higher. According to Plaintiff, the exchange rate in October 1999 was 10:1, and the filing fee would have been $200,000. Nevertheless, regardless of the exchange rate used, the filing fee is quite substantial.

B. Factual Allegations Regarding Jurisdiction[13]

The Gallery publishes a museum guidebook in English available for purchase by United States citizens. The Gallery has lent *Adele Bloch-Bauer I* to the United States in the past.

The Gallery is visited by thousands of United States citizens each year. The Gallery's collection, including the paintings at issue in this action, is advertised in the United States.

The Republic has a consular office in Los Angeles. The Republic promotes Austrian filmmakers in the United States. The Republic owns real property in Los Angeles.

C. Plaintiff's Claims

Plaintiff seeks recovery under a variety of causes of action. Her first cause of action is for declaratory relief pursuant to 28 U.S.C. § 2201; Plaintiff seeks a declaration that the Klimt paintings should be returned pursuant to the 1998 Austrian law. Plaintiff's second cause of action is for replevin, presumably under California law; Plaintiff seeks return of the paintings. Plaintiff's third cause of action seeks

13. Plaintiff also makes allegations regarding the activities of the National Tourist Office in United States. These allegations may not be used to assert jurisdiction over the Republic or the Gallery. *See* 28 U.S.C. § 1605(a)(3) (applying expropriation exception to FSIA when expropriated property is owned or operated by an agency or instrumentality of the foreign state when ***that*** agency or instrumentality is engaged in commercial activity in the United States).

rescission of any agreements by the Austrian lawyer with the Gallery or the Federal Monument Agency due to mistake, duress, and/or lack of authorization. Plaintiff's fourth cause of action seeks damages for expropriation and conversion, and her fifth cause of action seeks damages for violation of international law. Plaintiff's sixth cause of action seeks imposition of a constructive trust, and her seventh cause of action seeks restitution based on unjust enrichment. Finally, Plaintiff's eighth cause of action seeks disgorgement of profits under the California Unfair Business Practices law.

D. The Present Motion

Defendants argue that they are immune from suit under the doctrine of sovereign immunity, and that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1601, *et seq.*, does not strip them of this immunity. Defendants also argue that the Court should decline to exercise jurisdiction over the present dispute under the doctrine of *forum non conveniens*, that the action should be dismissed for Plaintiff's failure to join indispensable parties under Fed. R. Civ. P. 19, and that venue in the Central District of California is improper.

Plaintiff argues that Defendants are subject to the Foreign Sovereign Immunities Act, but that the expropriation exception to sovereign immunity is applicable to Defendants. Plaintiff also argues that even if Defendants are not subject to the FSIA, they are required to return the paintings under international and Austrian law. Plaintiff argues that the Court should not apply the doctrine of *forum non conveniens* because no reasonable alternative forum is available. Plaintiff

also argues that dismissal is not required under Fed. R. Civ. P. 19 because Plaintiff has received assignments of rights from other parties with interest in the paintings and because, in the absence of an alternative forum, it would be unjust to dismiss the present action. Finally, Plaintiff argues that venue is appropriate in the Central District because Defendants have failed to deliver the paintings to her within the district and because Defendants do business within the district.

II. Subject Matter Jurisdiction — The Applicability of the Foreign Sovereign Immunities Act

A. Rule 12(b)(1) Standard

A motion to dismiss an action for lack of subject matter jurisdiction is properly brought under Fed. R. Civ. P. 12(b)(1). The objection presented by this motion is that the Court has no authority to hear and decide the case. When considering a Rule 12(b)(1) motion challenging the substance of jurisdictional allegations, the Court is not restricted to the face of the pleadings, but may review any evidence, such as declarations and testimony, to resolve any factual disputes concerning the existence of jurisdiction. See *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

B. Foreign Sovereign Immunities Act — General Rule

The FSIA is the sole basis for jurisdiction over a foreign state and its agencies and instrumentalities. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683 (1989). Under the FSIA, foreign states are presumed to be immune from the jurisdiction of the

United States courts unless one of the FSIA's exceptions applies. 28 U.S.C. § 1604.

C. Burden of Proof Under FSIA

If a plaintiff's allegations and uncontroverted evidence establish that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017, 113 S. Ct. 1812 (1993).

D. Applicability of FSIA to pre-1952 Events

1. The Tate Letter

Until 1952, foreign states and their agencies and instrumentalities were absolutely immune from suit in United States courts. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S. Ct. 1962 (1983); *Siderman de Blake*, 965 F.2d at 705. In 1952, the Acting Legal Adviser of the State Department, Jack Tate, sent a letter ("the Tate Letter") to the Acting Attorney General announcing that the State Department was adopting the restrictive principle of foreign sovereign immunity. *Verlinden*, 461 U.S. at 487, n.9. Under the restrictive principle of sovereign immunity, the immunity of a foreign sovereign is recognized with regard to a sovereign's public acts (*jure imperii)*, but is not recognized with respect to a sovereign's private acts (*jure gestionis*). *Siderman de Blake*, 965 F.2d at 705 (citations omitted).

The Tate Letter, while announcing this new policy, did not provide courts with concrete standards for determining whether to assert jurisdiction over suits against foreign states. *Id.* In 1976, with the passage of the FSIA, Congress provided such standards. *Id.* The FSIA codified the restrictive theory of sovereign immunity and conferred subject matter jurisdiction over claims against foreign sovereigns on the United States courts. *Id.*; H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6613.

2. Defendant's Position — FSIA Does Not Apply to Pre-1952 Events

Defendants argue that because the FSIA was meant to codify the restrictive principle of sovereign immunity, and because this policy was not adopted until 1952, the FSIA is not applicable to actions that occurred prior to 1952. Defendants contend, therefore, that they are entitled to absolute sovereign immunity in accordance with the State Department's policy prior to the issuance of the Tate Letter. Defendants' position is not without support.

The Eleventh Circuit first considered this issue in 1986. *See Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917, 107 S. Ct. 371 (1987). At issue in *Jackson* were claims regarding bearer bonds issued by the Imperial Government of China in 1911 that were to mature in 1951. *Id.* at 1497. The Eleventh Circuit affirmed the district court's holding that the FSIA did not confer jurisdiction for actions prior to the issuance of the Tate Letter. *Id.* The Eleventh Circuit reasoned that courts normally presume that legislative enactments are to apply

prospectively, and that there was no reason to deviate from this presumption because the FSIA was not intended to affect the substantive law of liability. *Id.* The Eleventh Circuit agreed with the district court's reasoning that to apply the FSIA to pre-1952 events would interfere with China's established expectations of absolute immunity. *Id.* Therefore, the Eleventh Circuit concluded, the FSIA did not apply to pre-1952 events. *Id.* at 1499.

In 1985, the District Court for the District of Columbia relied on *Jackson* and held that the FSIA did not apply to a claim based on a 1922 agreement between the plaintiff and the United States of Mexico. *Slade v. United States of Mexico*, 617 F. Supp. 351, 356 (D.D.C. 1985). The district court in *Slade*, like the Eleventh Circuit in *Jackson*, reasoned that the presumption of prospective application of legislative enactments supported Mexico's position that the FSIA did not apply to pre-1952 events. *Id.* at 356. The *Slade* court also had the same concerns as the *Jackson* court regarding interfering with the foreign sovereign's established expectations of absolute immunity. *Id.* at 357. Later, in 1993, the District Court for the District of Columbia again held, relying on *Jackson* and *Slade*, that the FSIA was inapplicable to pre-1952 events. *Djordevich v. Bundeminister Der Finanzen, Federal Republic of Germany*, 827 F. Supp. 814 (D.D.C. 1993). This case was affirmed by the District of Columbia Circuit on other grounds.

In 1988, the Second Circuit relied on *Jackson* and *Slade* and held that the Union of Soviet Socialist Republics ("USSR") was absolutely immune from claims based on debt instruments issued by the Russian Imperial Government in

1916 because the claims arose prior to the issuance of the Tate Letter. *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1988), *cert. denied*, 487 U.S. 1219, 108 S. Ct. 2874 (1988). The Court noted that a retroactive application of the FSIA would adversely affect the USSR's settled expectation of immunity from suit in the United States courts. *Id.*

Although the Defendants' position on the FSIA's applicability to pre-1952 events is supported by case law, the continued viability of these cases is in doubt in light of the United States Supreme Court's subsequent decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994). *Landgraf*, as well as cases decided after *Landgraf* regarding the FSIA's application to pre-1952 events, lead the Court to conclude that the FSIA applies to pre-1952 events.

E. *Landgraf v. USI Film Products, Inc.*

In *Landgraf*, the United States Supreme Court held that in determining whether to apply a legislative enactment to events that occurred prior to the enactment, a court must first consider whether Congress expressly stated the statute's reach. *Landgraf*, 511 U.S. at 280. If Congress has made no expression of its intent, the court must then determine whether, if applied to events that preceded the enactment's effective date, the statute would have a "retroactive effect"; i.e., whether it would impair rights a party possessed when he acted, impose new duties on a party, or increase a party's liability for past conduct. *Id.* Statutes conferring jurisdiction generally do not have a retroactive effect. *Id.* at 274

("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed"). "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " *Id.* (citation omitted).

The *Landgraf* case noted the tension between two principles of statutory interpretation. The first principle is that normally a court is to apply the law in effect at the time it renders a decision. *Id.* at 264. The second principle is that cited by the *Jackson*, *Carl Marks*, and *Slade* cases: Retroactivity of legislative enactments is not favored in the law. *Landgraf*, 511 U.S. at 264. In its discussion of retroactive application of jurisdictional statutes, the Supreme Court noted that the first principle — application of present law — is the most relevant. "Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than the rights or obligations of the parties.' " *Id.* (citation omitted). Thus, the Supreme Court rejected the rationale that was employed by the *Jackson*, *Carl Marks*, and *Slade* courts in situations involving the question of retroactivity of jurisdictional statutes. In these situations, the Supreme Court favors applying the law in effect at the time of the decision.

The FSIA does not affect any substantive law determining the liability of a foreign state or instrumentality. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 103 S. Ct. 2591 (1983). *See also* H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin. News at 6610 ("The bill is not intended to affect the

substantive law of liability.").[14] This favors applying the FSIA to pre-1952 events. *See Jeffries v. Wood*, 114 F.3d 1484

14. *But see Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S. Ct. 1962 (1983). The *Verlinden* Court rejected a constitutional challenge to the FSIA and held that a claim brought pursuant to the FSIA "arises under" federal law as that term is used in Article III of the United States Constitution. In arriving at this conclusion, the Court noted that the FSIA is more than a mere jurisdictional statute:

> As the House Report clearly indicates, the primary purpose of the act was to "set forth comprehensive rules governing sovereign immunity" . . . ; the jurisdictional provisions of the Act are simply one part of this comprehensive scheme. The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law, . . . and applying those standards will generally require interpretation of numerous points of federal law.

Id. at 496-97 (citations omitted). At first glance, the above-quoted passage from *Verlinden* seems at odds with *First Nat'l City Bank*'s pronouncement that the FSIA was not intended to affect the substantive law determining the liability of a foreign state. These cases, however, were decided in the same session of the United States Supreme Court, and were issued within one month of each other. *See Verlinden*, 461 U.S. at 480 (decided May 23, 1983); *First Nat'l City Bank*, 462 U.S. at 611 (decided June 17, 1983). Presumably, therefore, any inconsistencies between the two decisions would have been resolved prior to the issuance of *First Nat'l City Bank*. A closer reading of *Verlinden* leads the Court to the conclusion that there is no inconsistency between the two decisions.

(Cont'd)

(9th Cir.) (en banc) (noting that *Landgraf* identified statutes that confer or oust jurisdiction as an example of statutes that generally do not have a retroactive effect), *cert. denied*, 522 U.S. 1008, 118 S. Ct. 586 (1997). Other courts that have, after *Landgraf*, considered the applicability of the FSIA to pre-1952 events have suggested or concluded that the FSIA should apply to pre-1952 events. In 1994, the District of Columbia Circuit addressed the issue in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121, 115 S. Ct. 923 (1995). There, the court noted that there is a strong argument in favor of applying the FSIA to pre-1952 events. *Id.* at 1170. The FSIA provides

(Cont'd)

The *Verlinden* Court reasoned that the FSIA was within Congress' Article I power to regulate foreign commerce, and that the FSIA was within the Article III limitations on the power of the judiciary because claims against foreign sovereigns would necessarily arise under federal law.

> Congress, pursuant to its unquestioned Article I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. In so doing, Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into the federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states. ***The resulting jurisdictional grant is within the bounds of Article III, since every action against a foreign sovereign, necessarily involves application of a body of substantive federal law, and accordingly "arises under" federal law, within the meaning of Article III.***

Id. at 497 (emphasis added).

that "[c]laims of foreign states to immunity should ***henceforth be decided*** by courts of the United States . . . ***in conformity with the principles set forth in this chapter***." 28 U.S.C. § 1602 (emphasis added). This language, the *Princz* court stated, suggests that the FSIA is to be applied to all cases decided after its enactment regardless of when the plaintiff's cause of action may have accrued. *Princz*, 26 F.3d at 1170. The *Princz* court also noted that this result is supported by *Landgraf* because the FSIA is a jurisdictional statute that does not alter substantive legal rights.[15] *Id.* at 1171.

Later, in 1999, the District of Columbia Circuit held that a 1988 amendment to the FSIA could be applied to events preceding the amendment's enactment. *Creighton Limited v. Government of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999). The court reasoned that the amendment was jurisdictional in nature and that therefore, under *Landgraf*, could be applied under the principle of statutory interpretation requiring the court apply the law in effect at the time it renders a decision. *Id.* at 124.

15. Defendants correctly note that *Lin v. Government of Japan*, No. 92-2574, 1994 WL 193948 (D.D.C., May 6, 1994), held that the FSIA should not be applied to pre-1952 events. The *Lin* court explicitly noted that *Landgraf* did not require a contrary result. *Id.* at *12. However, *Lin* is not persuasive for two reasons. First, the decision itself is not a published decision and is therefore of little precedential value in light of the District of Columbia Circuit's Rule 28(c), which prohibits the citation of this case as precedent to the District of Columbia. Second, *Lin* was decided before *Princz* and *Creighton*, in which the District of Columbia Circuit noted that, under *Landgraf*, application of the FSIA to pre-1952 events is appropriate.

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A district court in the Northern District of Illinois relied on *Princz* and *Creighton* and held that the FSIA could be applied to pre-1952 events. *Haven v. Rzeczpospolita Polska (Republic of Poland)*, 68 F. Supp. 2d 943, 945 (N.D. Ill. 1999) (denying Poland's motion to dismiss claims based on allegations of expropriation of real property during and shortly after World War II). Although the *Haven* court noted that the determination of whether to apply the FSIA to pre-1952 events was a difficult question to resolve, the court noted that the post-*Landgraf* cases of *Princz* and *Creighton* were more persuasive than the pre-*Landgraf* cases of *Jackson* and *Carl Marks*. This Court agrees.

For these reasons, the Court holds that the FSIA applies to pre-1952 events.[16]

F. Expropriation Exception to Sovereign Immunity

1. An Exception of the FSIA Must Apply

Even though the FSIA applies to pre-1952 events, one of the exceptions to the FSIA's general rule of immunity must

16. Both parties seem to assume that only pre-1952 conduct is at issue in this action. Indeed, the conduct of Gallery officials in the late 1940s is relevant, but other conduct — well after 1952 — is at issue as well. Plaintiff's claims include allegations that Austria concealed the true ownership of the paintings from her and the other heirs even after 1952. The expropriation exception to foreign sovereign immunity concerns itself with property taken in violation of international law, rather than the taking of property in violation of international law. *See infra*, section III.F.2. These post-1952 acts also establish jurisdiction under the expropriation exception to foreign sovereign immunity.

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apply, or Austria is entitled to sovereign immunity. Plaintiff claims that the "expropriation exception" to the FSIA applies. *See* 28 U.S.C. § 1605(a)(3). That exception provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. . . .

Id.

This exception has two distinct clauses, separated by a semi-colon. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6613. The first clause "involves cases where the property in question or any property exchanged for such property is present in the United States." *Id.* Because the Klimt paintings are not present in the United States, the first clause does not apply.

The second clause involves cases in which "the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in

commercial activity in the United States. Under the second [clause], the property need not be present [in the United States] in connection with a commercial activity of the agency or instrumentality." *Id.*

This exception has three distinct requirements. First, there must be property taken in violation of international law — i.e., the property must have been expropriated. Second, the property must be "owned or operated by an agency of or instrumentality of a foreign state. . . ." Finally, the agency or instrumentality must be engaged in commercial activity in the United States.

2. Property Must Be Taken In Violation of International Law

At the jurisdictional stage, a court need not determine if property was taken in violation of international law; so long as the plaintiff's claims are substantial and non-frivolous, there is a sufficient basis for the exercise of the court's jurisdiction. *Siderman de Blake*, 965 F.2d at 711. The foreign state against whom a claim is made need not be the sovereign that expropriated the property at issue. *See* 28 U.S.C. § 1605(a)(3) (excepting claims regarding property "taken in violation of international law" rather than excepting claims against foreign states that have taken property in violation of international law).

There are three requisites to a valid taking under international law. *Id.* First, the taking must serve a public purpose; second, aliens must not be discriminated against or singled out for regulation by the state; and third, payment of just compensation must be made. *Id.* at 711-12.

Here, Plaintiff's allegations establish a substantial and non-frivolous claim that a taking in violation of international law occurred on at least two occasions. First, the Nazi "aryanization" of Ferdinand's art collection by the Nazis is undeniably a taking in violation of international law. The taking was not for public purpose; instead, some of the art was distributed to the collections of Hitler, Göring, and Dr. Fürher. Other art was sold for the benefit of the Nazi party.[17] Moreover, the Nazi's aryanization of art collections was part of a larger scheme of the genocide of Europe's Jewish population, and it requires no semantic stretch to characterize this program as singling out "aliens" for regulation by the state. Finally, no payment of just compensation was made as a result of this taking.

Next, Plaintiff has established a substantial and non-frivolous claim that a taking in violation of international law occurred when the paintings were "donated" to the Gallery in 1948 in order to secure export licenses for other works of art. These paintings were not taken for a public purpose; Austria's own laws required their retur.. to their rightful owners. Moreover, Austria's acknowledged practice of requiring export licenses for works of art stolen by the Nazis

17. Nazi Germany is not recognized as a valid foreign sovereign. *See Weiss v. Lustig*, 58 N.Y.S.2d 547 (1945) (refusing to recognize Nazi decree as the law of a sovereign state); *Kalmich v. Bruno*, 450 F. Supp. 227 (N.D. Ill. 1978) (holding that the act of state doctrine did not apply to actions of Nazi occupation forces in Yugoslavia because this doctrine applies only to the acts of a sovereign in its own territorial jurisdiction and not to the acts of belligerent force, during wartime, in an occupied territory of an enemy nation).

singled out aliens for regulation by the state because aliens would be much more likely to seek export of these artworks than would Austrian citizens. Additionally, because Austria's laws required the return of these artworks to their rightful owners, the exchange of certain works of art for export permits on other works of art cannot be viewed as just compensation.

Therefore, Plaintiff has made out a substantial and non-frivolous claim that these works of art were taken in violation of international law.

Defendants argue that Plaintiff must first exhaust her domestic remedies regarding her claims for the artworks before seeking the intervention of the United States courts. A plaintiff cannot complain that a taking has not been fairly compensated unless the plaintiff has first pursued and exhausted the domestic remedies in the foreign state that is alleged to have caused the injury. *Greenpeace, Inc. v. State of France*, 946 F. Supp. 773, 783 (C.D. Cal. 1996). However, this exhaustion requirement is excused when the domestic remedies are a sham, are inadequate, or would be unreasonably prolonged. Restatement (Third) of Foreign Relations Law, § 713, cmt. f (1986). For the reasons stated below in section IV, regarding the doctrine of *forum non conveniens*, the Court finds that the Austrian courts provide an inadequate forum for resolution of Plaintiff's claims.

For these reasons, Plaintiff's claim meets the "taking" requirement of the expropriation exception of the FSIA.

3. Property Must Be Owned or Operated by Agency or Instrumentality of a Foreign State

The FSIA defines an "agency or instrumentality of a foreign state" as any entity that is a separate legal person, that is an organ of a foreign state, and that is not a citizen of the United States or created under the laws of any third country. Until January 1, 2000, the Gallery was an agency or instrumentality of a foreign state. On January 1, 2000, the Gallery was privatized and is no longer an organ of the Republic. Nevertheless, this change in the structure of the Gallery's operations does not divest this Court of subject matter jurisdiction because the events in question occurred prior to the Gallery's privatization. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995) (holding that jurisdiction under the FSIA over an Israeli company was appropriate where Israel owned a majority of shares of the company when plaintiffs were injured by the company's products even though subsequent changes in ownership resulted in the company no longer being considered "an agency or instrumentality" of Israel).

The paintings are owned by the Republic, but are exhibited by the Gallery. The exhibition of these paintings fulfills the "owned or operated by an agency or instrumentality" requirement. *See, e.g., Siderman de Blake*, 965 F.2d at 712.

Therefore, Plaintiff's claim meets the "owned or operated" requirement of the expropriation exception of the FSIA.

4. The Agency or Instrumentality Must Be Engaged in Commercial Activity

Finally, the agency or instrumentality must be engaged in commercial activity in the United States. "Commercial activity" is defined by the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d). "The commercial character of an activity [is] determined by reference to the nature of the course of conduct of a particular transaction or act, rather than by reference to its purpose." *Id.* "[W]hen a foreign government acts . . . in a manner of a private player within [the market], the foreign sovereign's acts are "commercial" within the meaning of the FSIA." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S. Ct. 2160 (1992) (holding that the issuance of bonds by the Republic of Argentina was a "commercial activity" within the meaning of the FSIA). In determining whether a sovereign's acts are commercial, the focus of the inquiry is not whether the sovereign acts with a profit motive; "[r]ather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the ***type*** of actions by which a private party engages in trade and traffic or commerce." *Id.* (citations and internal quotation marks omitted; emphasis in the original). Therefore, while a sovereign's issuance of regulations limiting foreign currency exchange is a sovereign activity (because a private party could not ever exercise this authority), a contract by a sovereign to buy army boots or weapons is a commercial activity (because private companies can contract to acquire goods). *Id.*

Therefore, the issue before the court is whether the type of actions engaged in by the Gallery in the United States constitutes "commercial activity."[18] According to the allegations in the Complaint, the Gallery publishes a museum guidebook in English available for purchase by United States citizens, including those in the Central District, and the Gallery's collection, including the paintings at issue in this action, is advertised in the United States, including in the Central District. Moreover, the Gallery is visited by thousands of United States citizens each year, including United States citizens that reside in the Central District. Additionally, the Gallery has lent *Adele Bloch-Bauer I* to the United States in the past.

Plaintiff argues that operating a museum is an activity in which private parties engage. Indeed, the privatization of the Gallery in January 2000 bears out this argument. *Cf. Aschenbrenner v. Conseil Regional de Haute-Normandie*, 851 F. Supp. 580, 584 (S.D.N.Y. 1994) (holding that an art exposition was not a "commercial activity" within the meaning of the FSIA). Plaintiff's argument is well-founded, even though the Gallery itself operates on foreign soil. In *Siderman de Blake*, the Ninth Circuit held that a government-expropriated hotel's solicitation of American guests, the hotel's entertainment of those guests, and the acceptance of payment from credit cards and traveler's checks of those

18. The language of § 1605(a)(3) seems to limit the Court's inquiry to the nature of the activities of the agency or instrumentality, rather than to the sovereign ***and*** its agencies or instrumentalities. However, because the Court concludes that the Gallery engages in commercial activity within the meaning of the FSIA, the Court need not decide today whether this exception is so limited.

guests was sufficient commercial activity to confer jurisdiction under the FSIA. *Siderman de Blake*, 965 F.2d at 712. The Court concludes that under *Siderman de Blake*, the Gallery engages in commercial activity under the FSIA.

The Gallery also engages in commercial activity by publishing its guidebook that is available for purchase in the United States. *See Aschenbrenner*, 851 F. Supp. at 584 (suggesting that publication of a book containing photographs of an artist's works was a commercial activity). The Gallery also engages in commercial activity by advertising in the United States. *See Holden v. Canadian Consulate*, 92 F.3d 918 (9th Cir. 1996) (holding that promotion of products in the United States by an employee hired by a foreign sovereign constituted commercial activity because private parties engage in product promotion), *cert. denied*, 519 U.S. 1091, 117 S. Ct. 767 (1997).

Defendants argue that even if the Gallery engages in commercial activity, the Court still does not have jurisdiction over the Republic. Defendant's argument is based on the assumption that the Court may exercise jurisdiction over a foreign sovereign under only the first clause of the expropriation exception, which requires that the property be present in the United States and which is inapplicable to the present claims.

This argument, however, ignores the language of § 1605(a). All the enumerated exceptions to the FSIA in § 1605(a) clearly relate to when a court may exercise jurisdiction over a foreign state. Section 1605(a) begins with the clause "(a) A foreign state shall not be immune from the

jurisdiction of courts of the United States or of the States in any case . . . ," and then goes on to list a number of circumstances in which sovereign immunity is inapplicable. The second clause of § 1605(a)(3) should be read in the disjunctive, so that a foreign state shall not be immune when expropriated property is owned or operated by the foreign state's agency or instrumentality when that agency or instrumentality engages in commercial activity in the United States. Defendants' reading of the second clause of § 1605(a)(3), limiting immunity to the agency or instrumentality, is not consistent with the language of the statute or its legislative history.[19]

For these reasons, the Court concludes that the expropriation exception to the FSIA applies to Plaintiff's claims, and Austria is not entitled to immunity.

III. Personal Jurisdiction

Defendants also argue that even if an exception to sovereign immunity applies, Plaintiff's suit still cannot be maintained unless the Court has personal jurisdiction over the Republic and the Gallery.

The legislative history of the FSIA reveals that the intent of Congress was that if one of the FSIA exceptions to immunity existed, the constitutional due process requirements of personal jurisdiction were satisfied. H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.

19. Moreover, the FSIA defines a "foreign state" as including its agencies and instrumentalities. *See* 28 U.S.C. § 1603(a).

Code & Admin. News at 6613 ("Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States. These immunity provisions, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.")

Until 1992, Ninth Circuit authority had suggested that the Court would be required in a case involving FSIA to engage in a "minimum contacts" analysis. *See Siderman de Blake*, 965 F.2d at 704 n.4 ("[T]he exercise of personal jurisdiction also must comport with the constitutional requirement of due process"); *Gregorian v. Izvestia*, 871 F.2d 1515 (9th Cir. 1989) ("[I]f defendants are not entitled to immunity under the FSIA, a court must consider whether the constitutional constraints of the Due Process Clause preclude the assertion of personal jurisdiction over them."), *cert. denied*, 493 U.S. 891, 110 S. Ct. 237 (1989). Later case law, decided after the United States Supreme Court's decision in *Weltover*, suggests a different approach.

In *Weltover*, the Court explicitly declined to decide whether a foreign state is a "person" under the Due Process Clause because it found that due process had been satisfied. The Court cited to *Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S. Ct. 803 (1966), which held that States of the Union are not "persons" for purposes of the Due Process Clause. This citation suggests that the Court, in a case that properly presents the issue, would hold that foreign sovereigns are not entitled to due process protection.

Other courts, including the Ninth Circuit, have since explicitly declined to decide whether foreign sovereigns are "persons" under the Due Process Clause. *Theo. H. Davies & Co., Ltd. v. Republic of the Marshall Islands*, 174 F.3d 969 (9th Cir. 1999); *S & Davis Int'l, Inc. v. The Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000); *Hanil v. PT. Bank Negara Indonesia*, 148 F.3d 127, 130 (1998). In *Theo. H. Davies*, in light of the suggestion in *Weltover* that foreign sovereigns are not "persons" for purposes of the Due Process Clause, the Ninth Circuit significantly altered its previous approach and assumed, but did not decide, that foreign states are entitled to due process protection. *Theo. H. Davies*, 174 F.2d at 975 n.3 (citing *Weltover*).

Many courts considering whether they had personal jurisdiction over a foreign sovereign since *Weltover* have not been required to determine if the Due Process Clause applies to foreign sovereigns because those courts have been able to conclude without much analysis that due process has been satisfied. *See Theo. H. Davies*, 174 F.3d at 974-76; *Republic of Yemen*, 218 F.3d at 1303; *Hanil*, 148 F.3d at 130. This is because the more commonly employed exception to foreign sovereign immunity under the FSIA, the commercial activity exception, requires that the action be based on commercial activity carried on in the United States, connected with the United States, or that has a direct effect on the United States. *See* 28 U.S.C. § 1605(a)(2). When these requirements have been met, courts have been able to conclude that they have personal jurisdiction over the foreign sovereign by virtue of these contacts with the United States and that therefore the due process requirements for personal jurisdiction have been satisfied. *See Theo. H. Davies*, 174 F.3d at 974-76; *Republic of Yemen*, 218 F.3d at 1303; *Hanil*, 148 F.3d at 130.

It is less clear whether sufficient activity to satisfy the expropriation exception to foreign immunity would also satisfy due process. However, such an analysis is not required because foreign sovereigns are not "persons" for purposes of the Due Process Clause. As previously noted, Ninth Circuit case law prior to *Weltover*, by requiring a "minimum contacts" analysis, had implicitly held that foreign sovereigns are "persons" entitled to due process. *See Siderman de Blake*, 965 F.2d at 704 n.4; *Gregorian v. Izvestia*, 871 F.2d 1515. The Ninth Circuit has since retreated from this implicit holding by following the *Weltover* court's lead in assuming without deciding that due process was satisfied. *Theo. H. Davies*, 174 F.2d at 975 n.3 (citing *Weltover*).

The District Court for the District of Columbia has considered this issue in depth and has concluded that foreign sovereigns are not "persons" within the meaning of the Due Process Clause. *See Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C.1998); *World Wide Minerals, Ltd. v. Republic of Kazakhstahn*, 116 F. Supp. 2d 98 (D.D.C. 2000) (following *Flatow*); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 49 (D.D.C. 2000) (following *Flatow* and noting that it would seem that a foreign sovereign should enjoy no greater due process rights than the sovereign states of the union). This Court finds the *Flatow* court's rationale persuasive.

The *Flatkow* court first noted that most courts have simply assumed without deciding that a foreign sovereign is a "person" for purposes of constitutional due process analysis and that this assumption has rarely been examined in depth. *Flatow*, 999 F. Supp. at 19. The *Flatow* court cited *Afram v. Export Corp. v. Metallurgiki Halyps, S.A.*, 772 F.2d 1358,

1362 (7th Cir. 1985), which noted that an unexamined assumption regarding the ability of foreign corporations to object to extraterritorial assertions of personal jurisdiction was probably now "too solidly entrenched" to be questioned. The *Flatow* court rejected the notion that the unexamined assumption with which it was faced could not be questioned. So, too, does this Court.

The United States Supreme Court has held that a State of the United States is not entitled to substantive due process. *Katzenbach*, 383 U.S. at 323-24. Similarly, the United States Supreme Court has noted that "in common usage, the term 'person' does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304 (1989) (internal alterations and citations omitted); *see also Rios v. Marshall*, 530 F. Supp. 351, 372 (S.D.N.Y. 1981) (holding that foreign states are not "persons" subject to antitrust liability under the Sherman Act).

Several courts have held that the federal government, state governments, political subdivisions and municipalities within the United States are not "persons" within the meaning of the Due Process Clause. *See In re Herndon*, 188 B.R. 562, 565 n.8 (E.D. Ky. 1995) ("The Fifth Amendment accords due process of law to persons. A governmental entity is not a 'person.' The Fifth Amendment protects persons from the government; its does not necessarily protect one branch of the government from the actions of another branch."); *El Paso County Water Imp. Dist. No. 1 v. International Boundary and Water Comm'n*, 701 F. Supp. 121 (W.D. Tex. 1988); *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp.

157 (D.D.C. 1980); *State of Oklahoma v. Federal Energy Regulatory Comm'n*, 494 F. Supp. 636 (D.C. Okla. 1980), *aff'd on other grounds*, 661 F.2d 832 (10th Cir. 1981), *cert. denied sub nom., Texas v. Federal Energy Regulatory Comm'n*, 457 U.S. 1105, 102 S. Ct. 2902 (1982).

The personal jurisdiction requirement recognizes an individual liberty interest that is conferred by the Due Process Clause. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S. Ct. 2099 (1982). The personal jurisdiction requirement represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. *Id.* "It would be illogical to grant this personal liberty interest to foreign states when it has not been granted to federal, state or local governments of the United States." *Flatow*, 999 F. Supp. at 21. Accordingly, this Court holds that a foreign state is not a "person" under the Due Process Clause of the United States Constitution.

The previously-cited House Report's language is unambiguous — it states that *in personam* jurisdiction has been addressed within the requirements of the statute; the FSIA does not grant a liberty interest for the purposes of substantive due process analysis. H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code & Admin. News at 6611-12. This Court joins with the *Flatow* court's observation that "[f]oreign sovereign immunity, both under the common law and now under the FSIA, has always been a matter of grace and comity rather than a matter of right under United States law." *Verlinden*, 461 U.S. at 486, *citing Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116,

3 L.Ed. 287 (1812). Where neither the Constitution nor Congress grants a right, it is inappropriate to invent and perpetuate it by judicial fiat.

IV. Effect of International Agreements on the FSIA

Defendants correctly argue that the FSIA must be interpreted subject to international agreements that were in existence at the time of the FSIA's enactment. Defendants argue that Plaintiff's claims are barred by Articles 21 and 26 of the Austrian State Treaty of 1955, 6 UST 2369, and The 1959 Austrian Exchange of Notes Constituting an Agreement Concerning the Settlement of Certain Claims under Article 26 of the Austrian State Treaty ("1959 Agreement").

Plaintiff correctly points out, however, that Article 21 of the 1955 Treaty, providing that Austria would not be required to make reparations for damages arising out of the existence of war after September 1, 1939, was an agreement that Austria need not make reparations to the Allied Forces. Other provisions of this Treaty concern themselves with Austria's responsibility regarding the return of property improperly seized from its citizens during the Nazi invasion.

The second paragraph of Article 26 concerns only heirless or unclaimed property. The paintings at issue are neither. The 1959 Agreement established a fund for settlement of certain enumerated claims, e.g., pensions, insurance policies, and bank accounts, but works of art were not among these enumerated claims. Moreover, the United States government explicitly reserved the right to pursue unknown claims

Therefore, the existing international agreements at the time the FSIA was enacted do not require granting immunity to Austria as to Plaintiff's claims; in fact, these international agreements placed responsibility on Austria to return property that was improperly seized by the Nazis.

V. *Forum Non Conveniens*

Defendants argue that Plaintiff's claims should be dismissed under the doctrine of *forum non conveniens*. Plaintiff argues that this doctrine should not be applied because no reasonable alternative forum exists.

Under the doctrine of *forum non conveniens*, a district court "may decline to exercise its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 250, 102 S. Ct. 252 (1981). The party moving for dismissal under the doctrine of *forum non conveniens* must demonstrate the existence of an adequate alternative forum and that the balance of relevant private and public interest factors favor dismissal. *Creative Technology, Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995). The existence of the availability of an adequate alternative forum is a threshold issue, and dismissal is not appropriate if such a forum is unavailable. *See id.* Even though a court may not dismiss on *forum non conveniens* grounds when the foreign forum does not provide the same range of remedies as are available in the home forum, the alternative forum must provide some potential avenue for redress. *Ceramic Corp. of America v.*

Inka Maritime Corp., 1 F.3d 947, 949 (9th Cir. 1993). A foreign forum is inadequate when it offers no remedy at all. *See, e.g., El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677-78 (D.C.Cir. 1996). Austria does not provide an adequate alternative forum to Plaintiff. Plaintiff's claims, if asserted in Austria, will most likely be barred by the statute of limitations of thirty years.[20] Because of California's "discovery rule" with regard to stolen works of art, and assuming as true the allegations in the Complaint, Plaintiff would not be barred on statute of limitations grounds in this forum.[21] If Plaintiff's claims are barred by the statute of limitations, she would be left without a remedy; clearly therefore, Austria is not an adequate alternative forum for Plaintiff's claims.

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20. Defendants argue that the statute of limitations is tolled for fraudulent concealment. Significantly, however, Defendants have refused to waive their statute of limitations defense to Plaintiff's claims. Defendants rely on *Kilvert v. Tambrands, Inc.*, 906 F. Supp. 790 (S.D.N.Y. 1995) in support of their motion to dismiss on *forum non conveniens* grounds; however, the *Kilvert* court dismissed the action only after the defendants agreed to waive their statute of limitations defense. Defendants' failure to agree to waive this defense is indicative of a belief that Plaintiff's claims are barred by the statute of limitations.

Defendants also argue that Plaintiff's claim under the 1998 law would not be barred based on the statute of limitations. However, Defendants' argument ignores the fact that the 1998 law created no private right of action. Defendants contend that regardless of whether the 1998 law created a private right of action, the Austrian Constitution permits a claim for the discriminatory application of this claim. However, that claim is not currently before the Court.

21. *See supra note* 10.

Further, in this action for return of artwork valued at approximately $150 million, Austria's filing fees, even when reduced pursuant to Plaintiff's fee petition, also makes Austria an inadequate alternative forum. Austria's fee structure would require Plaintiff to pay the Austrian courts a filing fee that approximates the sum total of her liquid assets. This amount varies between approximately $130,000 to $200,000, depending on the exchange rate. Additionally, in the event Plaintiff loses, Plaintiff would be required to pay costs, including attorney's fees, to the Republic and the Gallery.[22] A foreign forum's requirement that the plaintiff post a bond to proceed with litigation will generally not make the forum inadequate, unless the plaintiff is indigent or the excessively high amount of the bond makes it unduly burdensome. *See* 17 *Moore's Federal Practice*, § 111.74[2][d] (Matthew Bender 3d ed.); *see also Nai-Chao v. Boeing Co.*, 555 F. Supp. 9 (N.D. Cal. 1982), *aff'd sub nom., Cheng v. Boeing Co.*, 708 F.2d 1406 (9th Cir. 1983) (noting that filing fee did not automatically render foreign forum inadequate); *cert. denied*, 464 U.S. 1017, 104 S. Ct. 549 (1983).[23] Here, it is clear that Plaintiff is not indigent. Nevertheless, the Court

22. Plaintiff would be unlikely to prevail in Austria, given the statute of limitations difficulties discussed above.

23. Defendants argue that *Cheng* requires dismissal of Plaintiff's claims. In *Cheng*, the district court held that a foreign forum was adequate for purposes of *forum non conveniens* analysis notwithstanding its burdensome filing fees, so long as the filing fees were not oppressively burdensome. The Ninth Circuit found no abuse of discretion in the district court's conclusion, but did not separately consider the district court's holding with regard to the filing fee. Therefore, *Cheng* is not controlling authority on this issue.

finds that the filing fee required by the Austrian courts is oppressively burdensome. Paying even the reduced amount would force an 85-year-old woman to expend a great majority, if not all, of her liquid assets. Moreover, Austria has appealed the reduction in filing fees, and contends that Plaintiff should be required to pay an even greater amount.

For these reasons, Defendants have failed to demonstrate that Austria provides an adequate alternative forum and therefore the Court will not dismiss Plaintiff's claims under the doctrine of *forum non conveniens*.

VI. Joinder of Necessary and Indispensable Parties

Defendants argue that the present action must be dismissed pursuant to Fed. R. Civ. P. 19(a) because Plaintiff has failed to join necessary parties.

A. Text of Rule 19(a)

Rule 19(a) provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter

> impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a).

Rule 19(a) provides three separate circumstances in which a person is to be considered a person to be joined if feasible (commonly referred to as "a necessary party"). First, a person is a necessary party if in the person's absence complete relief cannot be accorded among those already parties. Fed. R. Civ. P. 19(a)(1). The second and third circumstances share a common preliminary requirement: The person must claim an interest relating to the subject of the action. Fed. R. Civ. P. 19(a)(2). The second circumstance in which a person is a necessary party is when the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may as a practical matter impair or impede the person's ability to protect that interest. Fed. R. Civ. P. 19(a)(2)(i). Third, a person is a necessary party if the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence leaves any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. Fed. R. Civ. P. 19(a)(2)(ii). If any one of these three circumstances apply, the person is a necessary party. *Shimkus v. Gersten Cos.*, 816 F.2d 1318, 1322 (9th Cir. 1987).

B. Rule 19(a)(1)

The "complete relief" clause of Rule 19(a) addresses the interest in comprehensive resolution of a controversy and the desire to avoid multiple lawsuits regarding the same cause of action. *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983). Nevertheless, this provision is concerned only with "relief as between the persons already parties, not as between a party and the absent person whose joinder is sought." *Eldredge v. Carpenters 46 N. Cal. Counties Jt. Apprenticeship and Training Comm.*, 662 F.2d 534, 537 (9th Cir. 1981), *cert. denied*, 459 U.S. 917, 103 S. Ct. 231 (1982). The present action would resolve all claims between those already party to the present action; the presence of the other heirs is not required to fully adjudicate Plaintiff's claim to the paintings. This is so notwithstanding that others may assert an interest in the paintings as well.[24]

The Third Circuit has held that a party is not a necessary party based on the fact that the party might have a claim as to the property at issue in an *in rem* action. *Sindia Expedition, Inc. v. The Wrecked and Abandoned Vessel Known as the Sindia*, 895 F.2d 116 (1990) (holding that the state was not a necessary party in a controversy regarding a salvaged shipwrecked vessel based on state's assertion of ownership rights in the vessel and noting that "[t]he possibility that a successful party may have to defend its rights to the [vessel]

24. The heirs do not dispute the proportional share due to each of them; therefore, collectively, the heirs do not assert greater than a 100% interest in the paintings.

in a subsequent suit brought by the State does not make [the state] a necessary party"). By the same token, that the absent parties here may later claim an interest in the subject of the action — the paintings — does not make them necessary parties.

The heirs are not necessary parties within the meaning Fed. R. Civ. P. 19(a)(1).

C. Rule 19(a)(2)

Under both clauses of Rule 19(a)(2), the absent party must claim an interest relating to the subject matter of the action. This interest may be a legally protected interest or an interest that "is to be determined from a practical perspective." *Aguilar v. Los Angeles County*, 751 F.2d 1089 (1985), *cert. denied*, 471 U.S. 1125, 105 S. Ct. 2656 (1985). The heirs undeniably have an interest relating to the subject matter of the action. This action seeks return of six paintings. Among them, the heirs have a 100% interest in the paintings. Plaintiff claims only a subset of this interest — 25%.

Nevertheless, the heirs do not "claim an interest" within the meaning of 19(a)(2). When persons are aware of an action but choose not to claim an interest by failing to join in the action, they are not considered necessary parties. *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (holding that the district court did not err by finding that a party who was aware of an action but chose not to claim an interest was not a necessary party under Rule 19). For this reason, the heirs are not persons who claim an interest in the action and are therefore not necessary parties under Fed. R. Civ. P. 19(a)(2)(i) or (ii).

Even if this were not the case, however, the heirs would not be necessary parties under Rule 19(a)(2)(i) or (ii) for other reasons.

D. Rule 19(a)(2)(i)

The "impair or impede" clause of Rule 19(a)(2)(i) focuses on protecting the interest of the absent parties. Absent parties are not necessary parties if their interests are adequately represented by existing parties. *See, e.g., Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999). In *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992), *cert. denied*, 509 U.S. 903, 113 S. Ct. 2993 (1993), the Ninth Circuit considered three factors in determining whether an absent party would be adequately represented by existing parties.

First, the Court considers whether "the interests of a present party to the suit are such that it will undoubtedly make all" of the absent party's arguments. Here, the parties' claims to the paintings have the same genesis: All the heirs' claims to the paintings are based on their proportional inheritance (or their parent's proportional inheritance) of Ferdinand Bloch-Bauer's estate. The arguments supporting return of the paintings are common to all the heirs.

Next, the Court considers whether the party is "capable of and willing to make such arguments." The Court finds that Plaintiff is both capable of and willing to make all arguments in support of the heirs' claims. Plaintiff is aptly represented by counsel, and the heirs' interest is also partly advanced by amicus curiae Bet Tzedek.

Finally, the Court considers whether the absent party would "offer any necessary element to the proceedings" that the present parties would neglect to offer. Here, the absent parties would offer no additional element to the proceedings because, as explained above, the heirs' claims have a common genesis, and they have no disputes among themselves regarding the proportional interest of each.

Upon consideration of the factors enunciated by the Ninth Circuit, the Court finds that Plaintiff adequately represents the heirs' claims, and therefore, the heirs are not necessary parties under Rule 19(a)(2)(i).[25]

E. Rule 19(a)(2)(ii)

The "inconsistent obligations" clause of Rule 19(a)(2)(ii) focuses on the possibility that those already parties might be subjected to inconsistent obligations. This clause is concerned with inconsistent ***obligations***, not inconsistent ***adjudications.*** 4 *Moore's Federal Practice* § 19.03[4][d] (Matthew Bender 3d ed.). An action that merely determines the ownership rights of property does not expose any party to inconsistent obligations, notwithstanding the possibility that another party might later claim an interest in that property. *Sindia Expedition*, 895 F.2d at 123.

25. Additionally, Plaintiff has received assignments of the rights to the paintings from three of the four other heirs. With these assignments, Plaintiff represents a 75% interest in the paintings.

F. Defendant's Remaining Arguments

Defendants also argue that, generally, joint obligees are to be considered indispensable parties in an action to set aside a contract. (Plaintiff asks the court to rescind any agreement between the Gallery and the Austrian lawyer to exchange the paintings for export permits). Defendants rely on *Nike, Inc. v. Comercial Iberica De Exclusivas*, 20 F.3d 987, 991 (9th Cir. 1994), for this proposition. In *Nike*, the Ninth Circuit noted, in dicta, that generally joint obligees are indispensable parties to an action. In *Nike*, the joint obligees were a subsidiary and its parent, and the court held that a subsidiary's assignment of rights to a parent was a collusive attempt to maintain diversity jurisdiction because the subsidiary's presence in the suit would destroy diversity. These concerns are not present in this action.

The *Nike* court relied on an earlier Fifth Circuit case that is also cited by Defendants. In *Harrell v. Sumner Contracting Co. v. Peabody Peterson Co.*, 546 F.2d 1227 (5th Cir. 1977), the court noted the general rule that joint obligees are indispensable parties. The court's rationale, however, was based on the fact that the plaintiff and the party to be joined were joint venturers and that federal courts had held that all partners are indispensable parties in actions based on partnership contracts. Additionally, like the *Nike* court, the Fifth Circuit was concerned with the plaintiff's collusive attempt to invoke the court's diversity jurisdiction. The present case is distinguishable from *Harrell*. First, because no partnership is involved, the weight of authority regarding partnership agreements and indispensability of partners upon which the Fifth Circuit relied is inapplicable here. Second,

there are no concerns with collusive attempts to invoke the Court's diversity jurisdiction because the action is properly before the Court on federal question jurisdiction. Third, there is ample reason for not applying the general rule in this action. As explained previously, the other heirs are aware of the action but have chosen not to participate and their interest will be adequately represented by Plaintiff. *Bowen*, 172 F.3d at 689; *Shermoen*, 982 F.2d at 1318. Therefore, *Harrell* is not persuasive authority on the issue of the indispensability of joint obligees.

Finally, Defendants rely on *Lomayaktew v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), *cert. denied sub nom.*, *Susenkewa v. Kleppe*, 425 U.S. 903, 96 S. Ct. 1492 (1976) for the proposition that in an action to set aside a contract, all parties who may be affected by the determination of the action are indispensable. In *Lomayaktew*, the party held to be indispensable was the Hopi Tribe, which was the lessor of land in an action to void lease of land to coal mining company. In *Lomayaktew*, the Plaintiff could not be joined because of sovereign immunity. Later Ninth Circuit authority, however, leads the Court to find that application of this general rule to the present circumstances is inappropriate.

Cases decided since *Lomayaktew* have held that persons who do not join in an action despite knowing of the action do not claim an interest in the subject of the action and are therefore not necessary parties. *Bowen*, 172 F.3d at 689. Moreover, recent Ninth Circuit authority has also held that when, as here, the present parties will adequately represent the interests of the absent parties, the absent parties are not necessary parties. *Shermoen*, 982 F.2d at 1318. In the context

of this action, these cases are more persuasive than a *per se* rule that joint obligees are always indispensable parties. This is especially so given the repeated instruction to district courts that Rule 19 is flexible and should be given practical application. *See, e.g., Provident Tradesmen's Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116 n.12, 88 S. Ct. 733 (1968); *Takeda v. Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 819 (9th Cir. 1985); *Eldredge*, 662 F.2d at 537.

Defendants also argue that another individual in Austria, a member of the Müller-Hofmann family ("Müller-Hofmann"), has made a claim for the portrait of Amalie Zuckerkandl, and that Müller-Hofmann is therefore a necessary party to this action. However, Müller-Hofmann asserts a claim to only one painting at issue in this action. Each cause of action in this action involves all six paintings. Therefore, having concluded that each cause of action is not subject to dismissal with regard to the remaining five paintings, and mindful that the Court may consider at any time in the proceedings whether the appropriate parties are joined,[26] the Court does not now consider whether Müller-Hofmann is a necessary party.

For these reasons, Plaintiff has not failed to join necessary parties and dismissal pursuant to Rule 19 is inappropriate; therefore, the Court denies Defendants Rule 12(b)(7) Motion to Dismiss for failure to join necessary parties.

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26. *See McCowen v. Jamieson*, 724 F.2d 1421, 1424 (9th Cir. 1984) (holding that the issue of indispensability of parties may be raised at any time in the proceedings, even *sua sponte* and on appeal).

Appendix D

VII. Venue

The FSIA has its own venue provision. 28 U.S.C. § 1391(f)(1)-(4). In relevant part, that provision states:

> (f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; . . . (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

Id.

Plaintiff argues that venue is proper under § 1391(f)(1) because a substantial part of the events or omissions giving rise to the claim occurred in the Central District because Austria has failed to deliver the paintings to her in Los Angeles. Defendants, however, correctly contend that the events or omissions giving rise to the claim occurred in Austria, where the paintings are located and where decisions determining the status and disposition of the paintings have been made. *See* 17 *Moore's Federal Practice* § 110.04[1] (Matthew Bender 3d ed.). Therefore, venue is not appropriate under § 1391(f)(1).

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Plaintiff also contends that venue is proper under § 1391(f)(3) because Austria is doing business in the Central District. Defendants argue that the Gallery is not doing business in the Central District, and, in any event, the Gallery's activities do not establish that the Central District is a proper venue for claims against the Republic.

Unlike the other provisions of the FSIA that use the term "commercial activity," the FSIA's venue provision uses the term "doing business." The statutory scheme of the FSIA suggests that these terms, if not interchangeable, are at least substantially similar in meaning. The Court can find no authority that suggests that a foreign agency or instrumentality that engages in "commercial activity" within a district is not also "doing business" within a district. Therefore, venue is appropriate under § 1391(f)(3) because the Gallery engages in commercial activity in the Central District as explained in section III.F.3., *supra*.[27]

Defendants correctly argue that Plaintiff did not set forth § 1391(f)(3) as a basis for venue in the Complaint. Accordingly, Plaintiff is hereby **GRANTED** fifteen (15) days'

---

27. Also as explained in section II.F.3., the Gallery's commercial activities establish jurisdiction over the Republic under § 1605(a)(3). When read in conjunction with § 1605(a)(3), it seems clear that venue is proper as to the foreign state under the FSIA "doing business" provision, § 1391(f)(3), if the agency or instrumentality engages in commercial activity within the district. This construction is supported by the FSIA's definition of "foreign state", which includes agencies and instrumentalities within the term, "foreign state." 28 U.S.C. § 1603(b).

leave to amend the Complaint to set forth the basis for venue pursuant to § 1391(f)(3).[28]

VIII. Conclusion

For the reasons stated herein, Defendant's Motion to Dismiss is **DENIED.**

Plaintiff is hereby **GRANTED** fifteen (15) days' leave to amend the Complaint to set forth the basis for venue pursuant to § 1391(f)(3).

The portion of this Order holding that the Court has subject matter jurisdiction because Austria is not entitled to sovereign immunity is immediately appealable pursuant to the collateral order doctrine. *Compania Mexicana de Aviacion, S.A. v. United States*, 859 F.2d 1354 (9th Cir. 1988). For this reason, the Court hereby certifies the remaining portions of this Order for interlocutory appeal pursuant to 28 U.S.C. § 1291.

DATED this 4th day of May 2001.

s/ Florence-Marie Cooper
FLORENCE-MARIE COOPER, Judge
United States District Court

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28. This 15-day requirement will be stayed pending resolution of the interim appeal.

APPENDIX E — MINUTE ORDER AMENDING ORDER DENYING MOTION TO DISMISS, DATED MAY 4, 2001, OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION, ENTERED MAY 11, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CIVIL MINUTES - GENERAL

Case No. CV 00-8913 FMC(AIJx) Date: May 9, 2001

Title: *MARIA V. ALTMANN v REPUBLIC OF AUSTRIA, et al.*

PRESENT: *THE HONORABLE FLORENCE-MARIE COOPER, JUDGE*

ORDER ON DEFENDANT'S REQUEST FOR CLARIFICATION; ORDER AMENDING MAY 4, 2001 ORDER DENYING MOTION TO DISMISS

On May 8, 2001, Defendants filed a Request for Clarification of the Court's May 4, 2001, Order Denying Defendants' Motion to Dismiss. Defendants correctly note that the Court cited the incorrect statutory provision when it certified the issues of forum nonconveniens, joinder, and venue for interlocutory appeal. Specifically, the Court certified these issues for interlocutory appeal pursuant to 28 U.S.C. 1291; however, the statutory provision that should have been cited is 28 U.S.C. 1292(b). Accordingly, the final section, Section IX, of the Court's May 4, 2001, Order Denying Defendant's Motion to Dismiss is hereby amended to read:

Appendix E

IX. Conclusion

For the reasons stated herein, Defendant's Motion to Dismiss is DENIED.

Plaintiff is hereby GRANTED fifteen (15) days' leave to amend the Complaint to set forth the basis for venue pursuant to 1391(f)(3).

The portion of this Order holding that the Court has subject matter jurisdiction because Austria is not entitled to sovereign immunity is immediately appealable pursuant to the collateral order doctrine. *Compania Mexicana de Aviacion, S.A. v. United States*, 859 F.2d 1354 (9th Cir. 1988). For this reason, the Court hereby certifies the remaining portions of this Order for interlocutory appeal pursuant to 28 U.S.C. 1292(b).

MINUTES FORM 11 Initials of Deputy Clerk AW
CIVIL - GEN

APPENDIX F — ORDER AMENDING OPINION, DATED DECEMBER 12, 2002, OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND DENYING PETITION FOR REHEARING FILED APRIL 28, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 01-56003, 01-56398

D.C. No. CV-00-08913-FMC
Central District of California, Los Angeles

MARIA V. ALTMANN, an individual,

Plaintiff - Appellee,

v.

REPUBLIC OF AUSTRIA, a foreign state; and the AUSTRIAN GALLERY, an agency of the Republic of Austria,

Defendants - Appellants.

ORDER AMENDING OPINION AND DENIAL OF REHEARING

Before: WARDLAW, W. FLETCHER, Circuit Judges, and WHYTE, District Judge.

The Opinion filed December 12, 2002, slip op. 1, and appearing at 317 F.3d 954 (9th Cir. 2002), is amended as follows:

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1. At slip opinion 16; 317 F.3d at 964, insert the following sentence after the citation to *Verlinden B.V. v. Central Bank of Nigeria* and before the sentence beginning "In 1943, the Supreme Court pronounced . . .":

> This explanation made no distinction between *in rem* and *in personam* actions.

2. At slip opinion 16; 317 F.3d at 965, insert the word "alleged" in the sentence beginning "Determining whether the FSIA . . ." so that the sentence reads in full: "Determining whether the FSIA may properly be applied thus turns on the question whether Austria could legitimately expect to receive immunity from the executive branch of the United States for its alleged complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings."

3. At slip opinion 17; 317 F.3d at 965, insert the word "allegedly" in the sentence beginning "That Austria and the United States . . ." so that the sentence reads in full: "That Austria and the United States were no longer on opposite sides of World War II at the time the Federal Monument Agency allegedly attempted to extort valid title to the Klimt paintings does not mean that Austria could reasonably expect the granting of immunity for an act so closely associated with the atrocities of the War."

4. At slip opinion 18, 317 F.3d at 966, insert the following language after the citation to the Letter of Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 (S.D.N.Y.) and before the sentence beginning "We conclude, as did Judge Wald, . . .":

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This letter strongly indicates that the State Department would not have recommended immunity as a matter of grace and comity for Austria's expropriation of the Klimt paintings. Indeed, in January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, warning that

> they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.
>
> Accordingly the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons . . . resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

Dep't St. Bull., Jan. 1943, at 21-22.

With these amendments, the panel has voted unani-mously

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to deny the petition for panel rehearing. Judges Wardlaw and Fletcher have voted to deny the petition for rehearing en banc, and Judge Whyte has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing will be entertained.

APPENDIX G — BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED JANUARY 13, 2003

No. 01-56003; 01-56398

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIA V. ALTMANN, an individual,

Plaintiff-Appellee

v.

REPUBLIC OF AUSTRIA, a foreign state; and the AUSTRIAN GALLERY, an agency of the Republic of Austria,

Defendants-Appellants.

On Appeal from an Order of the United States District Court for the Central District of California

BRIEF FOR AMICUS CURIAE THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Appendix G

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Appendix G

INTRODUCTION AND SUMMARY

The panel's decision in this case held that Austria is subject to suit in American courts for claims arising in Europe out of Nazi-era expropriations more than half a century ago. In so holding, the panel has created an exception to the general rule of foreign sovereign immunity never before recognized in our law. The panel reached this conclusion based upon an erroneous assessment of the principles of law that obtained in the first half of the last century, of the contemporaneous policy of the Executive Branch, and of the proper manner for analyzing retroactivity under the Foreign Sovereign Immunities Act.

The panel's belief that, without specific direction from the Executive Branch, American courts could historically exercise *in personam* jurisdiction over the foreign acts of unfriendly governments is without precedent. The language the panel cites in support of this conclusion derives from *in rem* cases, rather than *in personam* suits such as plaintiff's. Such an extension, without authorization under the FSIA or specific direction from the Executive, interjects the courts into matters of foreign policy in precisely the ways that the doctrine of immunity is intended to prevent. Nor, contrary to the panel's conclusion, had the Executive Branch made a determination to strip Austria of its immunity for suits arising out of Nazi atrocities. The panel's reliance on the so-called *Bernstein* Letter as evidence of such an exception is mistaken because that letter concerned the act of state doctrine, not the doctrine of foreign sovereign immunity. While undeniably horrific, Nazi-era expropriations would have been immune from suit in the United States when they occurred. Therefore,

the panel's exercise of jurisdiction pursuant to the expropriation exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3) – an exception to immunity not recognized until some thirty years later – is impermissibly retroactive.

ARGUMENT

BECAUSE AUSTRIA WOULD HAVE BEEN IMMUNE FROM SUIT ON PLAINTIFF'S CLAIMS AT THE TIME THEY AROSE, THE FSIA'S EXPROPRIATION EXCEPTION DOES NOT RETROACTIVELY PROVIDE A BASIS FOR JURISDICTION.

A. The Foreign Sovereign Immunities Act ("FSIA") sets forth a general rule that foreign states are immune from suit in American courts. 28 U.S.C. § 1604. Courts may exercise jurisdiction over foreign states *only* if the suit comes within one of the specific exceptions to that rule established by Congress. *See ibid.* The expropriation exception, the only exception discussed by the panel, was not recognized at the time plaintiff's claims arose, and may not, therefore, be applied retroactively.

It is well-established that changes in the law that affect substantive rights do not, absent a clear congressional indication to the contrary, apply retroactively. *See INS v. St. Cyr*, 533 U.S. 289, 316 (2001). This presumption against retroactivity applies also to "jurisdictional" statutes that affect substantive rights. *See Hughes Aircraft Co. v. United States*, 520 U.S. 939, 951 (1997). Where a new jurisdictional statute "eliminates a defense to * * * suit," the change affects

"the substance" of the parties' rights and will not apply to conduct that predates the change, unless Congress explicitly provides to the contrary. *Id.* at 948.

The defense of foreign sovereign immunity, currently embodied in the FSIA, is a matter of "*substantive* federal law." *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983) (emphasis added). Thus, as the Second and Eleventh Circuits have previously held, if a particular exception to the FSIA's general rule of immunity was not yet recognized at the time of the challenged conduct, that exception cannot apply retroactively. *See Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1988) (application of FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), to conduct pre-dating the adoption of that exception by the Executive in 1952 would be impermissibly retroactive); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986) (same).

The definitive discussion of the United States' policy regarding foreign sovereigns' susceptibility to suit in the United States at the time plaintiff's claims arose is contained in the "Tate Letter" of May 19, 1952 from Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip B. Perlm[illegible]. *See Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (reprinting Tate Letter). The Tate Letter explains that from the time of *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), until 1952, the United States adhered to the "absolute theory of sovereign immunity." *Alfred Dunhill*, 425 U.S. at 711 (reprinting Tate Letter). Under this doctrine, as understood by the Department

charged with its application: "*a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign.*" *Ibid.* (emphasis added).

As the Tate Letter makes clear, the United States did not recognize an expropriation exception to sovereign immunity prior to 1952. Nor, indeed, was it recognized under the "restrictive" theory that the Tate Letter adopted. *See Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes,* 336 F.2d 354, 360 (2d Cir. 1964) (under restrictive theory, foreign sovereigns continued to enjoy immunity with respect to suits challenging "strictly political or public acts about which sovereigns have traditionally been quite sensitive," including "internal administrative acts" and "legislative acts, *such as nationalization*" (emphasis added)). Rather, the expropriation exception was first recognized in American law as part of the FSIA. Because the expropriation exception was not recognized at the time plaintiff's claims arose, it cannot serve as the basis for jurisdiction in this suit.

The panel's opinion does not hold that the FSIA's expropriation exception applies retroactively to pre-1952 conduct generally, but only to Austria and, presumably, other countries allied with or occupied by Germany during World War II. There is no indication, however, that when Congress enacted the FSIA, and gave to the courts the responsibility to decide issues of immunity, Congress intended the courts to interject themselves into the arena of foreign policy by deciding, on a case-by-case basis, to deny a generally-available immunity to particular countries on the basis of their heinous conduct or the status of their relations with the United States. In fact, this Court and several others

have specifically rejected such a role for the courts. *See Siderman de Blake v. Republic of Argentina,* 965 F.2d 699, 718-19 (9th Cir. 1992); *Smith v. Socialist People's Libyan Arab Jamahiriya,* 101 F.3d 239, 244 (2d Cir. 1997); *Princz v. Federal Republic of Germany,* 26 F.3d 1166, 1174-1175, n.l. (D.C. Cir. 1994). Such an approach is, moreover, contrary to one of Congress's chief purposes in adopting the FSIA: to ensure a more uniform application of sovereign immunity principles. *See* H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606.

The above-quoted language from the Tate Letter clearly demonstrates that under the practice and policy established for the courts Austria *would* have been entitled to immunity from suit on claims such as this. The panel erred in failing to address and give effect to this contemporaneous statement by the Executive Branch of its practice regarding foreign sovereign immunity. The panel's contrary conclusion rests upon a misunderstanding of foreign sovereign immunity policy and practice during the pre-1952 period.

B. The panel's opinion relies upon the mistaken belief that, during the pre-1952 period, the courts were free to exercise *in personam* jurisdiction over foreign sovereign with respect to actions in its own territory if the United States did not have "friendly" relations with the sovereign at the time of the challenged conduct. The panel derived this view from the Supreme Court's statement in *Verlinden* that, prior to 1952, immunity was accorded "in all actions against *friendly* foreign sovereigns." *Altmann v. Republic of Austria,* 2002 WL 31770999, *7 (9th Cir. Dec. 12, 2002) *quoting Verlinden,*

461 U.S. at 486 (emphasis added by *Altmann*).[1] *Verlinden*'s use of the word "friendly" does not support the weight the panel placed upon it.

To begin, even if there were an exception for "unfriendly" nations, it is not clear that the exception would properly apply to Austria. The United States was not at war with the State of Austria. To the contrary, the United States took the view that Austria was the first country to be occupied by Nazi Germany. *See* Declaration on Austria at Moscow, *quoted in* Sen. Exec. Rpt. No. G, 84th Cong., 1st Sess. at 3 (June 15, 1955). Such subtle distinctions in our nation's foreign relations highlight the problem with courts undertaking the kinds of assessments called for under the panel's decision. The panel's approach requires courts to establish their own definition of "friendly," to assess historical relationships of the United States under this definition, and to decide how to weigh changes in relations during the period when suit might have been brought. The responsibility for drawing such lines among foreign governments and determining when to strip them of immunity can only properly be exercised by the political branches.

Moreover, as a matter of law, *Verlinden*'s reference to "friendly foreign sovereigns" does not support the proposition that our courts would have reached out to exercise *in personam* jurisdiction over foreign sovereigns for sovereign acts taken within their borders simply because the

1. The panel extended this perceived exception as well to acts committed while friendly relations admittedly existed if the act was "closely associated with the atrocities of the War." *Altmann,* 2002 WL 31770999, at *7.

United States was not on "friendly" terms with that government during the period of the challenged conduct. The history of the phrase "friendly foreign sovereigns" is instructive. *Verlinden* borrowed the phrase from the Court's decisions in *Ex Parte Peru,* 318 U.S. 578, 588-89 (1943), and *Mexico v. Hoffman,* 324 U.S. 30, 34 (1945). *See Verlinden,* 461 U.S. at 486 (citing the same). These cases were *in rem* proceedings against foreign-owned ships, and, in turn, borrowed the "friendly" foreign government terminology from prior *in rem* cases, including the leading case, *The Schooner Exchange. See Ex Parte Peru,* 318 U.S. at 588; *Hoffman,* 324 U.S. at 34. In *The Schooner Exchange,* the Court started with the general principle that "the person of the sovereign [is immune] from arrest or detention within a foreign territory" if he enters "with the knowledge and license of its sovereign." 11 U.S. (7 Cranch) at 137. The Court then went on to discuss in what circumstances this immunity extended to a foreign sovereign's warship that had entered an American harbor. The Court observed that "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace," *id.* at 141, and held, therefore, that immunity also extends to "national ships of war, entering the port of a friendly power open for their reception." *Id.* at 145-46.

This implicit indication that the United States would not refrain from seizing a belligerent nation's warships if they enter its ports during a war says nothing about whether, in the absence of specific direction from the Executive Branch, U.S. courts could exercise *in personam* jurisdiction over a non-consenting, unfriendly government with respect to acts committed within its own territory, including after normal

relations are resumed. *See Wulfsohn v. Russian Socialist Federated Soviet Republic,* 234 N.Y. 372, 373-74 (N.Y. 1923) (distinguishing between proceedings respecting "title to property situated within the jurisdiction of our courts" and suits where "[t]he government itself is sued for an exercise of sovereignty within its own territories" and rejecting argument that *in personam* jurisdiction could be exercised over Russia because it was not "friendly").

We are aware of no cases prior to 1952 in which a court asserted *in personam* jurisdiction over a foreign government for claims arising during a war between that nation and ours. Nor had the Executive Branch adopted any such blanket exception. Indeed, such an exception would likely cause the very type of "embarrass[ment] . . . to the government in conducting foreign relations" that the doctrine of immunity was intended to avoid. *See Ex parte Peru*, 318 U.S. at 588. *In personam* suits such as plaintiff's can, as a practical matter, only be pursued once the war is concluded and friendly relations resumed. But by that time, the foreign sovereign's presence in this country is again "with the knowledge and license of" our government, in which case comity would require recognition of the sovereign's immunity. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 137. If the conclusion of war on the battlefield signaled the start of the battle in the courtrooms, it would be far more difficult, if not impossible, for former adversaries to put their antagonisms behind them.

In the absence of precedent or a definitive statement of the Executive Branch creating such an exception, the courts during the period when plaintiff's claims arose would

not have created such an exception on their own. *See Hoffman*, 324 U.S. at 34-35 (in the absence of a specific recommendation from the Executive, courts must decide question of immunity "in conformity with the principles accepted by the department of the government charged with the conduct of our foreign relations").

Finally, the panel's opinion creates the anomaly of imputing to the "absolute" theory an exception to immunity that does not exist under either the restrictive theory of immunity or the FSIA, neither of which recognizes a general exception to immunity for acts committed while another country is "unfriendly" with the United States. *See* 28 U.S.C. § 1604 ("a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607"); *Princz*, 26 F.3d at 1171-75 (Germany's conduct during World War II immune under FSIA). *Cf. Saudi Arabia v. Nelson*, 507 U.S. 349, 362 n.5 (1993) (observing that, under Tate Letter regime, the State Department "recognized immunity with respect to claims involving the exercise of the power of the police or military of a foreign state"). Had an exception for "unfriendly" governments existed under the "absolute" theory, such an exception would presumably have continued to be recognized as subsequent changes narrowed the scope of immunity. Thus, the absence of such an exception today is strong evidence that no such exception existed in the 1930s and 40s.

C. The panel's belief that the Executive Branch had in fact adopted a policy after the war to deny Germany and Austria immunity from Nazi-era claims rests upon a misreading of the historical evidence. The panel's opinion

rests largely on a second letter by Mr. Tate, the so-called "Bernstein Letter," submitted to the Second Circuit in *Bernstein v. N.V. Nederlandshe-Amerikaansche,* 210 F.2d 375, 376 (2d Cir. 1954) ("*Bernstein II*"). The *Bernstein* Letter stated that the State Department's policy was "to relieve American courts of any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." April 13, 1949 letter of Jack B. Tate, *reprinted in Bernstein II*, 210 F.2d at 376. The *Bernstein* Letter did not, however, address the doctrine of foreign sovereign immunity. Rather it concerned the act of state doctrine, *i.e.,* a court's ability to pass on the validity of a foreign government's acts in a case that is properly within its jurisdiction.

In *Bernstein,* the plaintiff sued to recover commercial property that the Nazis had confiscated from him without compensation. *See Bernstein v. N.V. Nederlandshe-Amerikaansche,* 173 F.2d 71, 72 (2d Cir. 1949) ("*Bernstein I*"). Significantly, however, the defendant in *Bernstein* was not a foreign government, but a Dutch corporation. *Ibid.* The Second Circuit had initially applied the act of state doctrine, pursuant to which it refused to "pass on the validity of acts of officials of the German government." *Bernstein II*, 210 F.2d at 375. The *Bernstein* Letter addressed solely that issue. The *Bernstein* Letter does not speak to the susceptibility of the German government to suit in our courts, but instead concerns only the courts' "jurisdiction to *pass upon the validity of the acts of Nazi officials*." *Bernstein II*, 210 F.2d at 376 (reprinting letter) (emphasis supplied). *See also* Nov. 26, 1975 Letter of Legal Adviser Monroe Leigh to the Solicitor General (characterizing *Bernstein* Letter as "advis[ing] that the *act of state doctrine* need not apply to a

class of cases involving Nazi confiscations" (emphasis added)), *reprinted in Alfred Dunhill,* 425 U.S. at 706, 708.

The Supreme Court has recognized that "[t]he act of state doctrine, . . . although it shares with the immunity doctrine a respect for foreign states," is distinct from it. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 438 (1964) (applying act of state doctrine, though foreign government instrumentality had waived immunity by invoking the court's jurisdiction). The significance of this distinction was recognized at the time of the *Bernstein* and Tate letters by the Second Circuit. In *Zwack v. Kraus Bros.,* 237 F.2d 255 (2d Cir. 1956), plaintiff sued to stop an American company from using a trade name that the Hungarian government had expropriated. The defendant sought to have the suit dismissed both on act of state grounds and for plaintiff's failure to join Hungary as an indispensable party. With respect to the act of state doctrine, the Second Circuit declined to recognize the validity of Hungary's uncompensated expropriation, citing the United States' policy declared in *Bernstein II. See id.* at 260-61. At the same time, however, the Second Circuit recognized that the Hungarian government itself was "not subject to the jurisdiction of the court below unless its should voluntarily appear." *Id.* at 259.

Here, in contrast, the panel's decision confuses these distinct concepts. The panel's extension of the *Bernstein* Letter policy from the act of state context to the field of sovereign immunity is especially untenable in light of the author's own implicit rejection of such an interpretation. The *Bernstein* Letter was authored by the same person who wrote the Tate Letter only three years later. The panel's reading

creates a conflict between the two letters that did not exist and has never been thought to exist.

Contemporaneous conduct concerning the redress of Nazi-era wrongs further supports the conclusion that foreign governments, including Austria, were recognized to be absolutely immune from private litigation in U.S. courts on claims arising out of the Holocaust. The United States committed considerable energy to obtaining the return of property and some measure of compensation for the victims of the Holocaust both during the occupation and thereafter. In post-war treaties with both Germany and Austria, the United States obtained promises on the part of those governments to provide for the return of confiscated property, and in some cases the United States negotiated agreement for the payment of certain claims. *See, e.g.*, State Treaty for the Re-establishment of an Independent and Democratic Austria, 6 U.S.T. 2269, Art. 26 (May 15, 1955) (providing for return by Austria of all property confiscated on account of the racial origin or religion of the owner); Dept. of State Bulletin, July 9, 1956 at 66 (announcing procedures adopted under Austrian law for compensation of persecutees who had fled Austria); Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, 10 U.S.T. 1158 (May 22, 1959) (establishing administrative settlement fund for certain property claims); Convention on the Settlement of Matters Arising out of the War and the Occupation, as amended, 6 U.S.T. 4411 (October 23, 1954) (Germany).

The common theme of these arrangements is that they envision restitution or compensation under schemes adopted as part of domestic German or Austrian law or through

diplomatic arrangements. In none of these agreements is there any statement that private parties could sue the governments of Germany or Austria in foreign courts as an alternative means of redress. *Cf. Argentine Republic v. Amerada Hess Shipping*, 488 U.S. 428, 442 (1989) (holding that even a treaty "stat[ing] that compensation shall be paid for certain wrongs" by foreign government does not imply an abrogation of immunity from private suit). Likewise, it does not appear that prior to 1992, any plaintiff even *attempted* to sue Germany or Austria in American courts for Nazi-era atrocities. And, significantly, prior to this litigation, the two courts of appeals to consider such suits dismissed them for lack of jurisdiction. *See Princz*, 26 F.3d at 1176; *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001). The absence of any reference to private litigation in American courts against the German or Austrian governments in the United States' extensive diplomatic efforts to obtain compensation for the victims of Nazism and the similar absence of any attempt by a private party to sue Austria or Germany for Nazi-era atrocities during the period immediately following the war evidence a common understanding during the contemporaneous period that these governments were immune from such suit in the courts of the United States.

D. The various "additional reasons" that the opinion gives in support of its conclusion are also flawed and not relevant to determining whether an FSIA exception should apply retroactively. For example, it is irrelevant to the sovereign immunity inquiry that, as the panel observes, certain of the individuals responsible for Nazi atrocities were prosecuted criminally at Nuremberg. *See Altmann*, 2002 WL

31770999, at *9. The fact that individual Nazi officials could be criminally prosecuted in an international tribunal does not in any way suggest that the Austrian government was subject to suit by private plaintiffs in American courts. Indeed, individual officials are frequently subject to suit in circumstances where the sovereign retains its immunity. *See, e.g., Alden v. Maine,* 527 U.S. 706, 757 (1999). Neither the Executive nor the Congress has ever established a "war-crimes" exception to state immunity. *See Siderman de Blake,* 965 F.2d at 718-19.

Nor is it relevant that Austria adopted the restrictive theory of immunity in the 1920s. *Cf. Altmann,* 2002 WL 31770999, at *8. The panel does not cite any instance in which a foreign sovereign was denied immunity because it applied the restrictive theory of immunity in its own courts, and we are aware of none. Indeed, although, according to the Tate Letter, Peru was one of the countries that had previously accepted the restrictive theory of immunity, *see Alfred Dunhill,* 425 U.S. at 713, the United States certified, in 1942, the immunity of a Peruvian commercial vessel, *see Ex Parte Peru,* 318 U.S. at 579-81. The panel's analysis makes a foreign government's susceptibility to suit turn on "the defendant country's acceptance of the restrictive principle of sovereign immunity." *Altmann,* 2002 WL 31770999, at *9 (indicating that Russia, China, and Mexico, which had not accepted the restrictive theory, would be immune from suit for conduct during the pre-1952 era). But, as we previously noted, one of Congress's purposes in adopting the FSIA was to ensure a more uniform application of sovereign immunity principles. *See* H.R. Rep. 94-1487, 1976 USCCAN 6604, 6606. It would not have wanted

application of the FSIA to vary among countries, especially since the Executive Branch had never previously established such a rule.

Even if such distinctions were appropriate, Austria's adoption of the restrictive theory in the 1920's would still be inapposite to assessing Austria's immunity with respect to plaintiff's claim because, as noted above, the restrictive theory did not permit jurisdiction over a foreign government's sovereign or public acts, such as expropriation of property within its territory. *See Verlinden,* 461 U.S. at 486-87; *Victory Transport,* 336 F.2d at 360 (under restrictive theory foreign sovereigns retained immunity with respect to suits challenging "internal Administrative acts" and "legislative acts, *such as nationalization*" (emphasis added)). *See also Saudi Arabia v. Nelson,* 507 U.S. at 361 (citing same with approval).

Finally, the panel asserts that, even if Austria had an expectation of immunity from suit for discriminatory expropriations, such an expectation "would be due no deference," *Altmann,* 2002 WL 31770999, at *10. This assertion is contrary to the Supreme Court's holding in *Hughes.* In *Hughes,* there was no question that the defendant's alleged fraud against the United States was wrongful at the time it was committed, and that the conduct was even subject to suit by the federal government. 520 U.S. at 948. Nonetheless, the Court held that the presumption against retroactivity applied to a statute that allowed a new plaintiff, a private person, to bring the suit on behalf of the United States. *Id.* at 951. Thus, there is no basis for the panel's assertion that the presumption against retroactivity applies only to fields of law such as "contracts . . . in which courts have traditionally deferred to the 'settled expectations' of the parties." *Altmann,* 2002 WL 31770999, at *10.

Appendix G

CONCLUSION

For the foregoing reasons, the petition for rehearing and suggestion for rehearing en banc should be granted.[2]

Respectfully submitted,

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2. Because of space constraints, the United States has limited its arguments in this brief to the question of the Executive Branch's sovereign immunity practice prior to 1952, an issue as to which the government has a unique ability to speak. If the Court does grant rehearing, and calls for a new round of briefing, the United States reserves its right to address as well the other points raised in Austria's petition.

Appendix G

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January 13, 2003

Appendix G

STATUTORY ADDENDUM

28 U.S.C. § 1605(a) (3).

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

* * * * *

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States."

APPENDIX H — COMPLAINT DATED AUGUST 22, 2000

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 00-08913 FMC AIJx

MARIA V. ALTMANN, an individual,

Plaintiff,

v.

REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY, an agency of the REPUBLIC OF AUSTRIA,

Defendants.

Appendix H

COMPLAINT AGAINST THE REPUBLIC OF AUSTRIA AND THE AUSTRIAN GALLERY FOR:

(1) DECLARATORY RELIEF,
(2) REPLEVIN,
(3) RESCISSION,
(4) DAMAGES FOR EXPROPRIATION AND CONVERSION,
(5) DAMAGES FOR VIOLATION OF INTERNATIONAL LAW,
(6) IMPOSITION OF CONSTRUCTIVE TRUST,
(7) RESTITUTION BASED ON UNJUST ENRICHMENT, AND
(8) DISGORGEMENT PURSUANT TO CAL. BUS. & PROF. CODE § 17200 ET SEQ.

SUMMARY

This case seeks recovery of six paintings by Gustav Klimt owned by Maria V. Altmann, but in the wrongful possession of the Republic of Austria and the Austrian Gallery.

Mrs. Altmann was born in Austria but fled, for her life, when Austria delivered itself into the hands of the Nazis in 1938. In 1938 as well, the Nazis and their Austrian accomplices seized the property not only of Mrs. Altmann, but the rest of her family, including all property of her uncle, Ferdinand Bloch-Bauer. They did so for no other reason than because Altmann and her family were Jewish. Included among Ferdinand's possessions at the time were six fabulous paintings by Gustav Klimt (copies of which are reproduced

Appendix H

as Exhibit A hereto), consisting of two portraits of his wife (*Adele Bloch-Bauer I* and *Adele Bloch-Bauer II*), three landscapes (*Beechwood; Apple Tree I; Houses in Unterach am Attersee*), and a portrait of a close friend (*Amalie Zuckerkandl*). A seventh painting (*Schloss Kammer am Attersee III)* had been donated by Ferdinand to the Austrian Gallery in 1936, prior to the Austrians' rejection (and for those who were unable to flee, murder) of its Jewish population.

Ferdinand died in exile in Zurich, childless and a widower, in November 1945. He left his entire estate to three of his brother Gustav Bloch-Bauer's children: 25% to Mrs. Altmann, then living in Los Angeles; 25% to Robert Bentley, then living in Vancouver, Canada; and 50% to Luise Gattin, then living in Zagreb, Yugoslavia). His will was admitted to probate in Zurich in 1947. Mrs. Altmann, age 84, is the last surviving named heir.

Notwithstanding Ferdinand's bequest to his nieces and nephews; notwithstanding the fact that the paintings were stolen from Ferdinand; notwithstanding the fact that no party took good title from the defeated Nazis and their Austrian accomplices; and notwithstanding that the Republic of Austria had the legal – not to say moral – obligation to deliver the paintings to the heirs upon probate of Ferdinand's will, the Republic of Austria and the Austrian Gallery did not do so. Instead, motivated entirely by a now-admitted hatred of the Jews that continued even *after* they and their Axis partners were defeated in World War II and *after* the depths of the Holocaust were exposed, the Republic of Austria and the Austrian Gallery extorted the heirs out of their possessory

rights in exchange for purported "export permits" allowing the heirs to retrieve other property stolen from them.

Only in 1999 did the true facts about the Republic of Austria's and the Austrian Gallery's wrongful possession begin to come to light. Prior to then, the Republic of Austria and the Austrian Gallery hid these facts from the heirs and from the world, claiming – falsely – that they in fact had taken good title, honestly acquired. To their continuing disgrace, the Republic of Austria and the Austrian Gallery refuse to return the paintings or to pay for them.

There being no other recourse, Maria V. Altmann alleges against the Republic of Austria and the Austrian Gallery as follows:

Plaintiff MARIA V. ALTMANN alleges as follows:

THE PARTIES

1. Plaintiff MARIA V. ALTMANN ("ALTMANN"), is an individual residing in Los Angeles, California. ALTMANN was born in Vienna, Austria on February 18, 1916. In October 1938, after the annexation of Austria by Nazi Germany, she fled because of religious and racial persecution by the Nazis. (For example, before leaving Vienna her jewelry and other valuable possessions were confiscated by the Gestapo and her husband, Fritz Altmann, was imprisoned in the infamous Dachau concentration camp for several months and subsequently placed under house arrest.) ALTMANN came to the United States in 1940, settled in Los Angeles County in 1942 and has resided in Los Angeles

County ever since. ALTMANN became an American citizen in 1945.

2. ALTMANN is heir to 25% of the estate of her uncle Ferdinand Bloch-Bauer. ALTMANN brings this claim for herself and on behalf of the entire estate of Ferdinand Bloch-Bauer.

3. Defendant REPUBLIC OF AUSTRIA is a foreign state, as defined in 28 U.S.C. § 1603(a), located in Central Europe.

4. Defendant AUSTRIAN GALLERY is an art museum in Vienna, Austria. The AUSTRIAN GALLERY is also known in German as the *Österreichische Galerie Belvedere*, and has been formerly known as the *Moderne Galerie*, the *Österreichische Staatsgalerie*, and the *Galerie des XIX. Jahrhunderts*.

5. At all relevant times herein, and until January 1, 2000, the AUSTRIAN GALLERY was an agency and instrumentality, as defined in 28 U.S.C. §1603(b), of the REPUBLIC OF AUSTRIA, owned and operated by the REPUBLIC OF AUSTRIA (or during the Nazi era, by Germany). On January 1, 2000, the AUSTRIAN GALLERY was purportedly divested from the federal government and made a separate legal entity in Austria. However, the REPUBLIC OF AUSTRIA continues to own all of the paintings in the museum operated by the AUSTRIAN GALERY, including the paintings that are the subject of this action. The REPUBLIC OF AUSTRIA continues to control, operate and fund the AUSTRIAN GALLERY. Because all of

the facts alleged below concern events prior to January 1, 2000, the AUSTRIAN GALLERY and the REPUBLIC OF AUSTRIA are referred to herein collectively as the "AUSTRIAN GALLERY."

JURISDICTION AND VENUE

6. This Court has subject-matter jurisdiction and personal jurisdiction over the REPUBLIC OF USTRIA and the AUSTRIAN GALLERY under 28 U.S.C. §1330 because these are claims as to which neither party is entitled to immunity under 28 U.S.C. § 1605-7 (the Foreign Sovereign Immunities Act ("FSIA")). *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. Cal. 1992). Process shall be served on both defendants pursuant to 28 U.S.C. § 1608.

7. ALTMANN is a citizen of California. The AUSTRIAN GALLERY is an agency and subject of the REPUBLIC OF AUSTRIA, a foreign state. The amount in controversy is approximately $150 million.

8. This action concerns rights in property expropriated in violation of international law, namely six paintings by Gustav Klimt which were taken from Ferdinand Bloch-Bauer as a result of discriminatory taxes levied by the Nazis. After the Second World War, the AUSTRIAN GALLERY withheld these paintings from Ferdinand's heirs by deception, fraud and duress utilized in furtherance of the violations of international law committed by the Nazis. The truth was revealed only recently, but the AUSTRIAN GALLERY has still refused to relinquish the paintings to Ferdinand's heirs.

9. Before January 1, 2000, the property at issue was in the possession of the AUSTRIAN GALLERY, an entity that was an agency and instrumentality of the REPUBLIC OF AUSTRIA. Since January 1, 2000, the property at issue is in the possession of the REPUBLIC OF AUSTRIA and housed in the museum operated by the AUSTRIAN GALLERY.

10. The AUSTRIAN GALLERY is engaged in commercial activity in the United States.

a) The AUSTRIAN GALLERY edits and publishes a museum guidebook in English, which is sold to U.S. citizens and is available for purchase in the United States, and in Los Angeles County. The AUSTRIAN GALLERY asserts U.S. copyright ownership over this book, which is also published in New York. One of the looted artworks at issue in this action, the portrait of ALTMANN's aunt, *Adele Bloch-Bauer I*, is reproduced on the cover of the guidebook.

b) The AUSTRIAN GALLERY is visited by thousands of U.S. citizens each year, and accepts entrance fees from these visitors. The artworks that are the subject of this action are some of the main attractions of the museum. In its gift shop, the AUSTRIAN GALLERY sells memorabilia, including numerous images of the looted artworks at issue in this action, to U.S. citizens. The AUSTRIAN GALLERY accepts payment by U.S. credit card for these purchases.

c) The AUSTRIAN GALLERY engages in and receives the benefit of tourist advertising in the United States conducted by the official Austrian National Tourist Office,

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a non-profit agency sponsored and controlled by the REPUBLIC OF AUSTRIA, which has offices in various cities in the United States, including an office in Los Angeles, California. This advertising often features the AUSTRIAN GALLERY's famous collection of paintings by Gustav Klimt, which is comprised in substantial part by the looted artworks that are the subject of this action. Currently, the AUSTRIAN GALLERY is promoting its fall show entitled "Gustav Klimt and the Image of Women in Europe," which will be on display from September 20, 2000 to January 7, 2001. The looted pictures that are the subject of this action will be the main works in this exhibition. The AUSTRIAN GALLERY is borrowing artworks from the United States for this exhibition. The AUSTRIAN GALLERY is actively promoting this exhibition in America and towards Americans with the intention of attracting American tourists to this exhibition for the purpose of charging them entrance fees and selling merchandise to them.

d) The AUSTRIAN GALLERY has in the past also loaned artworks, including, upon information and belief, at least one of the works at issue in this action, *Adele Bloch-Bauer I,* to museums in the United States, and receives reciprocal benefits thereby.

e) In sum, the AUSTRIAN GALLERY uses the looted artworks at issue in this action for commercial activities directed at U.S. citizens, including citizens of Los Angeles, California.

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11. The REPUBLIC OF AUSTRIA is engaged in numerous other commercial activities in the United States, and in Los Angeles County in particular.

a) The REPUBLIC OF AUSTRIA has a consular office in Los Angeles, California, which serves to promote Austrian cultural and business interests in California and the Western United States.

b) The REPUBLIC OF AUSTRIA actively promotes its cultural interests in Los Angeles, including for example the interests of Austrian filmmakers. Representatives of the Austrian Federal Ministry for Education and Culture routinely visit Los Angeles as part of their mission to promote Austrian culture.

c) The Austrian National Tourist Office, a non-profit agency sponsored and controlled by the REPUBLIC OF AUSTRIA, has an office in Los Angeles. It conducts advertising campaigns promoting tourism to Austria in California and throughout the United States.

d) The REPUBLIC OF AUSTRIA owns real property in Los Angeles, which is used to promote Austrian business interests.

12. Venue is proper in this District under 28 U.S.C. § 1391(f)(1) because the REPUBLIC OF AUSTRIA and the AUSTRIAN GALLERY are in breach of their obligation to deliver the six Klimt paintings to ALTMANN in this District, and because ALTMANN presently resides and resided in this District at the time of the misappropriation of the property

at issue from her and afterwards. There is no other venue in the United States that would be more appropriate for this action than Los Angeles County. Austria is not a feasible venue for this action because the Austrian courts require payment of fees in proportion to the amount in controversy. In this case, those fees far exceed the value of ALTMANN's assets. ALTMANN applied to the Austrian courts for a waiver of the fees, which was only partially granted so that ALTMANN would have been required to expend all of her available assets other than her house – including her entire life savings – in order to proceed. The REPUBLIC OF AUSTRIA appealed this ruling, seeking to raise the level of costs even higher. As a result, ALTMANN cannot afford to proceed in Austria. Thus, there is no reasonable venue other than this court for this important matter to be heard.

BACKGROUND FACTS

The Bloch-Bauer Family Before The War

13. ALTMANN was born into the affluent Jewish Bloch-Bauer family in Vienna, Austria in 1916. Every Sunday she and her four older siblings would have brunch over at the beautiful home owned by her uncle Ferdinand and aunt Adele. Ferdinand was her father's brother; Adele was her mother's sister. Together, the two couples had combined their names to form the Bloch-Bauer family. Ferdinand's home, a large building on one of the finest streets in Vienna, was gorgeously decorated with fine artworks, tapestries, porcelain and furniture.

14. Ferdinand was a patron of Gustav Klimt and owned seven of his most important paintings, which are the paintings at issue in this case: *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Schloss Kammer am Attersee III; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl*. Reproductions of these paintings are attached hereto as Exhibit A.

15. Ferdinand was a citizen of Czechoslovakia with his principle residence (until 1938) in Vienna, Austria. The Klimt paintings were housed in his large home located at Elisabethstrasse 18 in Vienna.

16. When Adele died suddenly of meningitis in 1925, Ferdinand created a memorial room for her with the two full-length portraits of her and all four landscapes by Klimt. A seventh Klimt painting, the portrait of *Amalie Zuckerkandl*, was in Ferdinand's bedroom.

17. When Adele died, she left behind a short will that asked, but did not require, that her husband consider donating the two portraits and four landscapes to the AUSTRIAN GALLERY after his death.

18. Ferdinand's brother, Gustav Bloch-Bauer (ALTMANN's father), an attorney, was named the executor of Adele's estate. In the ensuing probate proceedings in Vienna, Austria, the Klimt paintings were declared by Gustav to be Ferdinand's property, not Adele's. Gustav also stated that Ferdinand was not bound by his wife's wishes with respect to the Klimt paintings. The Klimt paintings were not treated as part of Adele's estate during the administration of

the probate proceedings. The AUSTRIAN GALLERY was given notice of the proceedings.

19. Although the paintings belonged to Ferdinand, and not his wife, Gustav stated in 1926 that Ferdinand intended to fulfill his wife's wishes although he was not legally required to do so. However, Ferdinand did not execute any written document purporting to confirm this alleged intention to donate the paintings. Therefore, at no time was Ferdinand obligated to donate the paintings to the AUSTRIAN GALLERY.

20. In 1936, Ferdinand delivered one Klimt painting, *Schloss Kammer am Attersee III*, to the AUSTRIAN GALLERY at the request of the director of the AUSTRIAN GALLERY, Dr. Martin Haberditzl. The other six Klimt paintings remained in Ferdinand's possession until the Nazi invasion in 1938.

Escape From Austria

21. In December 1937, ALTMANN (age 21) was married. Her husband Fritz Altmann was the younger brother of the cashmere sweater manufacturer Bernhard Altmann. As a wedding gift, Ferdinand gave ALTMANN a diamond necklace and earrings that had once belonged to Adele. After just two months of marriage, in March 1938, the Nazis annexed Austria. Fritz was arrested and sent to Dachau as a hostage to force his brother, who had escaped to France, to sign over his foreign business accounts to the Nazis. The Gestapo took ALTMANN's jewelry, sending her diamond necklace to the Nazi leader Hermann Göring as a present for his wife.

22. After several months in prison, Fritz was ransomed by his brother and released from Dachau. ALTMANN was taken by the Gestapo to Berlin to seal the deal. Although Fritz was subsequently placed under house arrest, he and ALTMANN managed to escape on the way to a doctor's appointment. With Bernhard's help, they fled over the border to the Netherlands where they were met by Bernhard and flown to Liverpool, England, where the British had invited Bernhard to build a new sweater factory. ALTMANN and Fritz soon came to the United States and in 1942 reached Los Angeles, where ALTMANN has resided ever since. ALTMANN became a U.S. citizen in 1945.

23. Ferdinand, who was Jewish and had supported efforts to resist the Nazis prior to the annexation of Austria, fled the country ahead of the Nazis in March 1938 to avoid persecution. Ferdinand ultimately settled in Zurich, Switzerland, where he remained until his death in November 1945. Ferdinand fled first to his summer home in Czechoslovakia, a large castle and estate outside Prague. When the Nazis took the Sudetenland (western Czechoslovakia), Ferdinand fled to Zurich, Switzerland, and his estate outside Prague was used as the principal residence for the Nazi commander of the so-called Protectorate, Reinhard Heydrich. Heydrich, one of the principal architects of the Nazi's "Final Solution" for the extermination of European Jewry, was leaving Ferdinand's castle when he was assassinated in 1942.

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The Looting

24. In April and May 1938, the Nazis levied enormous taxes against Ferdinand in Vienna because he was Jewish. The imposition of these taxes was motivated by religious and racial animus.

25. In exile in Switzerland, Ferdinand was cut off from his family and all his possessions. The sugar company he directed was aryanized, and Ferdinand's shares held in Swiss banks were handed over to the Nazis. Ferdinand's home in Vienna was transferred to the railroad for its new headquarters. The artworks were plundered. In early 1939, a large group of Nazi and museum officials, including representatives of the AUSTRIAN GALLERY, met in Ferdinand's palais to discuss dividing up the enormous art collection. His famous 400-piece porcelain collection was sold at a public auction, with the best pieces going to Vienna's museums. Some of his 19th century artworks by Austrian masters were taken and given to Adolf Hitler and Hermann Göring. Others were bought for Hitler's planned museum in Linz. Dr. Erich Führer, the Nazi lawyer liquidating the estate, was given permission by Hitler's museum director Hans Posse to take a few paintings for his own personal collection in consideration for his service to the Third Reich.

26. Dr. Führer disposed of Ferdinand's six remaining Klimt paintings as follows:

a) In October 1941, Dr. Führer traded two Klimt paintings — *Adele Bloch-Bauer I* and *Apple Tree I* — to the AUSTRIAN GALLERY in exchange for the return of the

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painting *Schloss Kammer am Attersee III*, which Ferdinand had delivered to the AUSTRIAN GALLERY in 1936.

b) *Schloss Kammer am Attersee III* was subsequently sold by Dr. Führer to Ingeborg and/or Gustav Ucicky (an illegitimate son of Gustav Klimt who was a successful director of Nazi propaganda films) for approximately 6,000 Reichsmarks.

c) In November 1942, the painting *Beechwood* was sold by Dr. Führer to the Museum of the City of Vienna (*Wiener Städtische Sammlung)* for 5,000 Reichsmarks.

d) In March 1943, the AUSTRIAN GALLERY purchased the painting *Adele Bloch-Bauer II* from Dr. Führer for 7,500 Reichsmarks.

e) Dr. Führer kept the painting *Houses in Unterach am Attersee* for himself.

f) The portrait of *Amalie Zuckerkandl* also left the collection during this time and ended up in the hands of the art dealer Vita Künstler.

27. By early 1943, Ferdinand's entire art collection, including all the Klimt paintings, was liquidated and expropriated. The liquidation and expropriation of Ferdinand's estate were accomplished without his consent and in violation of international law. The liquidation was motivated by religious and racial hatred and occurred without payment of any just or fair compensation. In his second-to-last will, dated Oct. 8, 1942, written while in exile in Zurich,

Switzerland, Ferdinand wrote: "In an illegal manner, a tax penalty of one million Reichsmarks was imposed and my entire estate in Vienna was confiscated and sold."

Post-War Hostilities

28. Ferdinand died on November 13, 1945 in Zurich, Switzerland, several months after the War ended, having taken preliminary steps to retrieve his stolen property. In his last will, dated October 22, 1945, he revoked all prior wills and left his entire estate to two nieces (including plaintiff ALTMANN) and one nephew. He made no bequest to the AUSTRIAN GALLERY.

29. The government of Austria in the post-War period after 1945 was extremely hostile to restitution claims by exiled Jews. For example, at the end of the War, in April 1945, Dr. Karl Renner, a noted legal scholar, chancellor and post-war president of Austria, wrote:

> Restitution of property stolen from Jews, this [should be] not to the individual victims, but to a collective restitution fund. The establishment of such and the following foreseeable arrangements is necessary in order to prevent a massive, sudden flood of returning exiles. A circumstance, that for many reasons must be paid very close attention to. . . . The restitution to the victims cannot follow naturally. As soon as the property of the fund, which shall serve to compensate collectively all of the robbed individuals, is established, shares will be given out, for each pro rata based on the

> suffered damages — not by the measure of whether a person's property is completely, partially or not at all recoverable; this collective procedure naturally provides that claims can only be satisfied in relation to the recovered property and only after the completion of investigation, prosecution and return of valuables (that is after years!). . . . Basically the entire nation should be made not liable for damages to Jews.

30. This overwhelming hostility to the claims of Jews on the part of the Austrian government carried over from the Nazi period into the post-War period and placed every Jewish family with claims against the government in a very precarious position. If a claimant was to have any success at all, deals had to be made to assuage the government ministers and their cohorts, who in many cases were as anti-Semitic as their Nazi predecessors.

31. On May 15, 1946, the REPUBLIC OF AUSTRIA enacted a law declaring that all transactions which were motivated by discriminatory Nazi ideology were to be deemed null and void. In effect, this law should have nullified all of the transactions entered into by Dr. Führer during the liquidation and expropriation of Ferdinand's estate. Although the law appeared satisfactory on its face, in practice restitution was far from simple. The REPUBLIC OF AUSTRIA frequently put up legal roadblocks to restitution, such as demanding repayment of the purchase price before returning property to its Jewish owners, even though, as in Ferdinand's case, the Jewish owners had never received the payment. The restitution process in Austria after the War was imperfect, to say the least.

32. Under the law of Austria, artworks which were deemed to be important to Austria's cultural heritage could not be exported from the country, and no artworks could be exported without the permission of the Austrian Federal Monument Agency (*Bundesdenkmalamt*). ALTMANN alleges that the application of this law to Jews who were forced to flee Austria, or to their heirs who were attempting after the War to recover property left in Austria, was discriminatory and in violation of international law.

33. After the War, it was the practice of the AUSTRIAN GALLERY and the Federal Monument Agency to use the export permit laws to force Jews to donate or trade valuable artworks to the museum in exchange for export permits for other works. This practice has recently been declared to have been illegal, unethical and immoral extortion by the REPUBLIC OF AUSTRIA. ALTMANN alleges that this practice itself violated international law, and was an act in furtherance of the expropriations in violation of international law committed by the Nazis.

34. The Allies unwittingly facilitated the REPUBLIC OF AUSTRIA's extortionate practices. They had collected looted artworks and held them in the Art Collecting Point in Munich, Germany. However, individual applicants were not permitted to retrieve their property directly. Rather, the artworks would only be returned to their country of origin, which was then responsible for determining whether the artworks should be restituted. The REPUBLIC OF AUSTRIA used this procedure and laws against exporting cultural items to obtain and hold Nazi-looted artworks hostage. The Austrian Federal Monument Office routinely demanded

donations to federal museums before it would permit any artworks to be returned and exported to their former owners, most of whom remained outside Austria. Ferdinand's heirs were victims of this illicit practice.

The Heirs Try To Recover Ferdinand's Property

35. On May 23, 1947, the Zurich District Court recognized ALTMANN as the heir to 25% of Ferdinand's estate. At the time, ALTMANN was a U.S. citizen residing in Los Angeles County. ALTMANN's older brother Robert Bentley of Vancouver, Canada, and sister Luise Gattin of Zagreb, Yugoslavia, were recognized as heirs of 25% and 50% of the estate, respectively. Luise was stranded in Yugoslavia, where she had survived the War with two young children. Her husband was arrested by the communists and executed for being a "capitalist." ALTMANN's older brother Robert, who had fled to Vancouver, Canada with his two other brothers, took up the task of attempting to retrieve Ferdinand's property, which by law now belonged to his heirs.

36. Robert retained a lawyer in Vienna, Dr. Gustav Rinesch, a family friend who had also been retained by Ferdinand in the months before his death, to locate and retrieve property stolen from Ferdinand during the Nazi period.

37. ALTMANN's older brother Karl Bloch-Bauer, a captain in the allied armed forces, returned to Vienna and recovered one of the Klimt paintings, *Houses in Unterach am Attersee*, from Dr. Führer, who was imprisoned for Nazi activities. The painting was kept, along with other artworks

taken by Dr. Führer from Ferdinand's collection, in Karl's (or his lawyer's) apartment in Vienna pending a request for permission to export the works to Canada.

38. In December, 1947, the Museum of the City of Vienna offered to return the painting *Beechwood* to Ferdinand's heirs in exchange for a refund of the purchase price.

39. In January 1948, Dr. Rinesch wrote to the AUSTRIAN GALLERY informing it of the heirs' claim to the three paintings that had come into the museum's possession as a result of transactions conducted by Dr. Führer.

40. In February 1948, Dr. Karl Garzarolli of the AUSTRIAN GALLERY responded in writing to Dr. Rinesch, asserting (falsely) that six Klimt paintings were bequeathed to the museum by the will of Adele Bloch-Bauer, who died in 1925, and that Ferdinand had asked permission from the museum to keep the paintings during his lifetime. Dr. Garzarolli demanded that the heirs deliver the other paintings referenced in Adele's will to the museum. These false claims were repeated to Dr. Rinesch in February, 1948 by the former director of the AUSTRIAN GALLERY, Prof. Bruno Grimschitz, who had been removed from his position after the War. At the end of February, 1948, Dr. Rinesch wrote to Robert Bentley informing him of the AUSTRIAN GALLERY's position and its claims concerning the will of Adele Bloch-Bauer.

41. In March 1948, Dr. Garzarolli learned of the true contents of Adele's will and probate proceedings. He then

realized that the AUSTRIAN GALLERY's claims concerning the Klimt paintings were untenable. First, in the probate proceedings concerning Adele Bloch-Bauer's will, the attorney for the estate, Ferdinand's brother Gustav Bloch-Bauer, had declared that the Klimt paintings were not the property of Adele, but of her husband Ferdinand, and they were treated as such in the estate proceedings. Second, in her will Adele had expressed only the unenforceable wish that her husband consider leaving the paintings to the museum after his death. Third, although Gustav Bloch-Bauer in 1926, and Prof. Grimschitz in 1948, declared that Ferdinand, had promised to fulfill his wife's wishes, there was no notarized document signed by Ferdinand, making the alleged promise unenforceable against Ferdinand or his heirs.

42. Garzarolli realized the invalidity of his museum's claim to the Klimt paintings, as he very revealingly confided in a letter to his Nazi-era predecessor, Bruno Grimschitz, on March 8, 1948:

> Because there is no mention of these facts [the purported donation of the Klimt paintings by Adele or Ferdinand] in the available files of the AUSTRIAN GALLERY, i.e. neither a court-authorized nor a notarized or other personal declaration of Ferdinand Bloch-Bauer exists, which in my opinion you certainly should have obtained, I find myself in an extremely difficult situation. . . . I cannot understand why even during the Nazi era an incontestable declaration of gift in favor of the state was never obtained from Ferdinand Bloch-Bauer. . . .

> In any case, the situation is growing into a sea snake . . . I am very concerned that up until now all of the cases of restitution have brought with them immense confusion. In my opinion it would be also in your interest to stick by me while this is sorted out. Perhaps that way we will best come out of this not exactly danger-free situation.

The Extortion

43. Despite the heirs' diligent efforts to locate the records and the truth regarding their inheritance, Dr. Garzarolli did not disclose these facts to Dr. Rinesch or the heirs, and kept the files from Adele's probate proceedings in his possession. Instead, despite his private reservations, Dr. Garzarolli took an aggressive stance against the heirs and prepared to sue them to obtain the other Klimt paintings that were not yet in the AUSTRIAN GALLERY's possession.

44. On around March 30, 1948, officials from the AUSTRIAN GALLERY reviewed artworks in the apartment of Karl Bloch-Bauer (or his attorney) in order to advise the Federal Monument Agency whether to permit the artworks to be exported to Canada, where Karl and his brother, Robert Bentley, resided. The officials from the AUSTRIAN GALLERY recognized that several of the artworks in the apartment, including Klimt's *Houses in Unterach am Attersee,* were formerly part of the estate of Ferdinand Bloch-Bauer.

45. On April 1, 1948, Dr. Garzarolli of the AUSTRIAN GALLERY wrote to the Austrian Attorney General

(*Finanzprokuratur)* seeking legal assistance in obtaining the Klimt paintings which were not yet in the possession of the AUSTRIAN GALLERY, including the Klimt painting in Karl Bloch-Bauer's (or his lawyer's) apartment.

46. On April 2, 1948, Dr. Garzarolli wrote to Dr. Otto Demus, president of the Federal Monument Agency, notifying him that the AUSTRIAN GALLERY was interested in obtaining several of the artworks belonging to the heirs of Ferdinand Bloch-Bauer which were seen in Karl's apartment. Dr. Garzarolli requested that the processing of export permits for the heirs' artworks be delayed "for tactical reasons."

47. On April 3, 1948, Dr. Demus of the Federal Monument Agency telephoned and met with Dr. Rinesch and informed him that the AUSTRIAN GALLERY put great value in the artworks in Karl's apartment and that a quick agreement concerning export permits was unlikely. Dr. Demus discussed the subject of the Klimt paintings with Dr. Rinesch and informed him that if there was a dispute over these works, none of the artworks from Ferdinand's collection would be permitted to be exported to the heirs until that dispute was resolved.

48. This discussion also pertained to a large number of valuable artworks from Ferdinand's collection which had been stolen by the Nazis for the collections of Adolf Hitler and Hermann Göring, among others, and were being held in the Allied Art Collecting Point in Munich, Germany. These artworks could only be returned to the heirs after the allied forces had delivered them to Austrian authorities at the request of the Federal Monument Agency. These works would

also be subject to review by the AUSTRIAN GALLERY and the Federal Monument Agency, and export permits would only be granted with their consent. Given the high artistic and monetary value of these other works, Dr. Rinesch had every reason to expect that the AUSTRIAN GALLERY and the Federal Monument Agency would attempt to use the export permit restrictions to obtain "donations" of a number of these artworks.

49. On April 10, 1948, Dr. Rinesch met with Dr. Garzarolli to discuss the impending application for export permits for the entire collection of Ferdinand Bloch-Bauer, including the artworks in Karl's apartment and those sought from the Art Collecting Point in Munich. In the course of this meeting, Dr. Rinesch told Dr. Garzarolli that Ferdinand's heirs would acknowledge the will of Adele Bloch-Bauer and allow the AUSTRIAN GALLERY to keep the six Klimt paintings mentioned in that will. Dr. Rinesch made this agreement with the hope and expectation that Dr. Garzarolli would permit the heirs to export other artworks. Dr. Rinesch knew that Dr. Garzarolli's cooperation was absolutely necessary if he was to obtain export permits for any of the artworks from Ferdinand's collection.

50. Dr. Rinesch saw the probate files for Adele's will for the first time on April 10, 1948, the same day he met with Dr. Garzarolli and agreed that the heirs would "donate" the Klimt paintings. He apparently realized that Adele's will was not legally binding, but purportedly believed at the time that the evidence of Ferdinand's purported promise to fulfill his wife's wishes would be sufficient to give the museum a claim, as he reported to Robert Bentley on April 11, 1948.

51. Dr. Rinesch's April 11, 1948 report to Robert Bentley was mistaken and his legal conclusion concerning the enforceability of Ferdinand's purported promise was incorrect. In fact, Ferdinand's purported promise had no binding effect and was legally unenforceable. Dr. Rinesch most likely did not know at the time that Ferdinand's purported promise was never memorialized. In later documents, Dr. Rinesch alleged that the heirs had had the ability to prevent the Klimt paintings from going to the AUSTRIAN GALLERY, and successfully argued that their "donation" to the museum justified the granting of export permits for other artworks.

52. On April 12, 1948, Dr. Rinesch executed a document purporting to acknowledge on behalf of the heirs of Ferdinand Bloch-Bauer the intention expressed in Adele's will concerning the Klimt paintings. Dr. Rinesch possessed no valid legal authority to enter into this agreement, and the AUSTRIAN GALLERY, contrary to ordinary and customary practice, never requested proof of his authority, or confirmation in writing by the heirs, even though Dr. Rinesch asked that the agreement be confirmed with his client Robert Bentley.

53. On or about April 12, 1948, Dr. Rinesch allowed the AUSTRIAN GALLERY to pick up the Klimt painting *Houses in Unterach am Attersee* from Karl's apartment.

54. On April 13, 1948, Dr. Rinesch submitted to the Federal Monument Agency a lengthy application for export permits for the remainder of Ferdinand Bloch-Bauer's art collection. Dr. Rinesch sent a copy of the application to

Dr. Garzarolli asking for his support for the application, concluding in his cover letter, "I rely on your sense of justice."

55. Although not without difficulties caused by Dr. Garzarolli and Dr. Demus, over the next 18 months Dr. Rinesch obtained export permits for almost all of the other recovered artworks. Still fighting for export permits in July 1949, Dr. Rinesch wrote:

> The Bloch-Bauer heirs have, to document their interest in the public Austrian collections, in the most loyal way agreed that the major works of the Austrian painter Gustav Klimt from the Bloch-Bauer collection may remain at the AUSTRIAN GALLERY as a bequest. Even if this bequest was originally already foreseen in the will of Ferdinand Bloch-Bauer's deceased wife, the heirs certainly had the ability to prevent the fulfillment of this bequest, because in the meantime the financial circumstances of the testatrix's family had changed catastrophically and also the remaining conditions of the bequest had fallen away through the experiences of the Third Reich.

56. Dr. Rinesch enlisted the support of Dr. Garzarolli, who now agreed to approve lifting the export restriction on several remaining works, based on the purported donation of the Klimt paintings:

> The AUSTRIAN GALLERY has recently studied the question again and believes that for the following reasons approval of export can be

recommended for both paintings without exception. Namely, the heirs of Ferdinand Bloch-Bauer have immediately agreed to acknowledge and accept Ferdinand's declaration that in the event of his death he wished to follow the wishes of his deceased wife to donate the paintings by Gustav Klimt to the AUSTRIAN GALLERY, despite various transactions by Bloch-Bauer's attorney during the Nazi era that extremely worsened the situation of the AUSTRIAN GALLERY, and thereby established a way for the AUSTRIAN GALLERY actually to receive this bequest.

57. In the course of seeking export permits, the heirs were also required to donate one further work to the AUSTRIAN GALLERY, as well as 19 porcelain settings and 16 Klimt drawings to other federal museums. A watercolor and 15 porcelain settings had to be traded for comparable, but probably inferior, substitutes from the federal museum collections.

58. With the assistance of Dr. Rinesch, the AUSTRIAN GALLERY also obtained the Klimt painting *Beechwood* from the Städtische Sammlungen, and a notarized agreement from Gustav Ucicky to donate his Klimt paintings, including *Schloss Kammer am Attersee III*, to the AUSTRIAN GALLERY after his death, which occurred in 1961.

59. The government continued to fight the heirs in other ways, dragging out the negotiations over the return of Ferdinand's sugar factory for over ten years. The heirs and

their attorney finally gave in, settling for a payment of just $600,000 from the sale of the sugar factory. As part of the settlement, they were forced to give up the beautiful Elisabethstrasse home, which to this day houses the offices of the Austrian railroad. They also had to sell a number of the returned artworks to pay taxes the government said were due from the factory. Nothing was ever retrieved from Czechoslovakia. Almost all of the fabulous porcelain collection was never returned, and pieces continue to show up at auction – the owners purportedly immune from suit under Europe's "bona fide" purchaser rules, despite the fact that it is difficult to imagine how purchasers could have been unaware that these were snatched from their rightful owners.

60. From Ferdinand's once enormous personal estate, little or nothing remained. The post-war restitution process in Austria had turned the old maxim on its head – to the defeated went the spoils.

Lack of ALTMANN's Authorization, Knowledge or Consent

61. ALTMANN never authorized Dr. Rinesch to negotiate on her behalf or to allow the AUSTRIAN GALLERY to obtain the Klimt paintings. ALTMANN was not fully informed of these activities and proceedings until January 1999, when documents relating to the transfer of the Klimt paintings were released by the REPUBLIC OF AUSTRIA in connection with a review of the provenance of artworks obtained by the AUSTRIAN GALLERY in the post-war period. Until 1999, ALTMANN mistakenly believed that the artworks had been freely donated by her aunt Adele

and uncle Ferdinand to the AUSTRIAN GALLERY before the War. She was unaware that the paintings were stolen from her uncle and that it was only through the unauthorized agreement of Dr. Rinesch in April 1948, purportedly made on her behalf, that the AUSTRIAN GALLERY had claimed ownership of the paintings.

62. ALTMANN's mistaken belief was the result of the false statements made by the AUSTRIAN GALLERY to Dr. Rinesch, which were transmitted to ALTMANN's brother, Robert Bentley, in Vancouver, Canada, and later recounted to ALTMANN by her brother and other family members. Furthermore, in numerous exhibits and publications concerning the Klimt works, the AUSTRIAN GALLERY had provided incorrect provenance information and had repeated the false claim that the artworks were donated by Ferdinand and Adele Bloch-Bauer to the museum on dates inconsistent with the true facts.

63. For example, in the book *Gustav Klimt in the AUSTRIAN GALLERY Belvedere in Vienna* by Dr. Gerbert Frodl, the current director of the AUSTRIAN GALLERY, it is alleged that the two paintings *Adele Bloch-Bauer* and *Apple Tree I* were obtained by the museum through a bequest of the Bloch-Bauer family in 1936. The book also states that *Adele Bloch-Bauer II* was obtained from Ferdinand Bloch-Bauer in 1928. This provenance information is false, and is belied by numerous documents that are in the AUSTRIAN GALLERY's possession. The paintings were obtained in 1941-1943, during the liquidation of Ferdinand's estate by the Nazis.

Appendix II

64. Until the recent investigation prompted by the enactment of a new Austrian law in December 1998, however, ALTMANN had no reason to question these statements and did not know, and could not have known, the truth until documents evidencing these facts were released by the AUSTRIAN GALLERY and the Federal Monument Agency in 1999.

65. ALTMANN's brother Robert and sister Luise, both of whom died before 1999, also were unaware of the truth regarding Ferdinand's Klimt paintings. ALTMANN is informed and believes, and based thereon alleges that the heirs did not properly authorize Dr. Rinesch's April 1948 agreement, and could not have learned of the truth before 1999. For his part, Dr. Rinesch probably believed that under the circumstances, and the duress imposed by the REPUBLIC OF AUSTRIA and the AUSTRIAN GALLERY, he was doing the best for Ferdinand's heirs. Indeed, Dr. Rinesch was relatively successful in securing the release of other artworks, largely as a result of his "donation" of the Klimt paintings. But this does not mitigate the fact that none of the heirs were fully informed of the underlying facts prior to his decision, and none of them properly authorized the "donation" of the Klimt paintings.

The Revelation

66. In early 1998, in the wake of the seizure of two paintings by Egon Schiele that had been loaned to the Museum of Modern Art in New York by a government-supported Austrian foundation, the Austrian federal minister

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for education and culture, Elisabeth Gehrer ("Gehrer"), opened up the old archives to permit researchers to prove that no looted artworks remained in Austria.

67. Thereafter, and much to her surprise, an Austrian author and journalist, Hubertus Czernin ("Czernin"), published a series of articles exposing the fact that Austria's federal museums had profited greatly from the extortion of artworks from exiled Jewish families after the War. Principal among these artworks were the collections of the Bloch-Bauer, Rothschild and Lederer families. Klimt's *Portrait of Adele Bloch-Bauer I*, which all the museum publications represented as having been donated to the museum in 1936, was revealed to have been transferred to the museum only in 1941 with a letter from the Nazi lawyer Führer signed "Heil Hitler." The revelations were devastating.

68. Gehrer responded by closing the Federal Monument Agency archives and ordering a thorough investigation by a committee of archivists from the various federal museums and headed by the director of the Federal Monument Agency, Ernst Bacher ("Bacher"). The researchers essentially confirmed Czernin's stories and reported to Gehrer that indeed many valuable artworks had not been restituted to their owners after the war and in many cases donations were coerced by government officials. In several instances, such as with the Klimt paintings from the Bloch-Bauer collection, the provenance had been falsified to hide the fact that the paintings had been stolen during the War.

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Promised Restitution

69. In response, in September 1998, Gehrer proposed a new restitution law, designed to return artworks that had been donated to federal museums under duress in exchange for export permits, or obtained by the federal museums despite having a provenance which suggested that they were never properly restituted to their pre-War owners. The law was unanimously approved by the Austrian parliament and signed into law by the President of Austria in December 1998. The new law created a committee made up of government officials and art historians which was to advise Gehrer which artworks should be returned and to whom. Dr. Rudolf Wran ("Wran"), the section chief for culture under Gehrer, was selected to head this committee.

70. In January, 1999, the government permitted Czernin to copy the documents in the Federal Monument Agency files. Czernin provided copies to ALTMANN's attorney, E. Randol Schoenberg ("Schoenberg"). It was at this time that ALTMANN first learned that the AUSTRIAN GALLERY had lied to her brother's attorney about the contents of Adele's will, and had swindled her out of her inheritance.

71. In early February, the committee announced its first recommendation to return hundreds of artworks to the Austrian branch of the Rothschild family. Later that month, Minister Gehrer responded to parliamentary inquiries regarding a long list of suspect artworks by concluding with respect to the Bloch-Bauer collection that "the connection between the donation of the Klimt paintings and the export

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permit law is evident." The Austrian press reported in big headlines that the Klimt paintings would have to be returned to Ferdinand's heirs.

The Opposition

72. But Wran and the other committee members had other plans. Most of them were greatly distressed by the prospect of returning these icons of Austrian art to Ferdinand's heirs. The Rothschild collection, while certainly very valuable, did not include any significant Austrian artworks. As valuable as it was, the entire Rothschild collection, which was auctioned off in July 1999 for $90 million, was probably worth only a little more than half as much in today's market as Ferdinand Bloch-Bauer's Klimt paintings that are at the core of the Klimt collection at the AUSTRIAN GALLERY, Vienna's most popular museum. Certainly in terms of their importance to Austria, Ferdinand's Klimt paintings are in a class by themselves.

73. Anticipating possible opposition from the very conservative committee, Schoenberg obtained an opinion from an Austrian expert on probate and estate law, Dr. Andreas Lintl, on the significance of Adele's will. Lintl concluded (as had Gustav Bloch-Bauer in 1948 and Garzarolli and Dr. Rinesch in 1948) that the statements in Adele's will were of no legal consequence and that the heirs had not been required to give the paintings to the AUSTRIAN GALLERY. This meant that the paintings were donated solely in exchange for export permits and would have to be returned under the new restitution law. Schoenberg sent the opinion to Wran.

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74. In March, Bacher's research committee submitted a report on the Bloch-Bauer collection to Wran's committee, and sent a copy to Schoenberg. The report omitted key documents, gave only a partial view of the story, and made several incorrect conclusions. For example, the report omitted the crucial portions of Dr. Garzarolli's March 8, 1948 letter to Dr. Grimschitz. Schoenberg wrote to Wran and Bacher correcting the report and asked that his letter and further documents be shown to Wran's committee. Unbeknownst to Schoenberg, this request was not honored and the rest of the committee was forced to rely on an incomplete and misleading report.

75. Schoenberg met with Wran in late April, but Wran could not discuss the specifics of the case. Wran forced the decision on the Bloch-Bauer collection to be pushed off by the committee until the end of June. In the meantime, he and one of his compatriots on the committee, Manfred Kremser, a government attorney, drafted a legal opinion contrary to the one submitted by the heirs. Not knowing the conclusions of the government attorney's opinion, Schoenberg requested by telephone and in writing that he be given an opportunity to read any contrary opinion and to address the committee and respond to any arguments made against restitution. This request was refused by Wran and Kremser. Having heard from the press that opposition was brewing, but in the dark as to what Kremser had written, Schoenberg submitted a further opinion from Lintl again concluding that neither Ferdinand, nor his heirs, were legally required to donate the paintings to the AUSTRIAN GALLERY.

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The Decision

76. On June 28, 1999, the committee met and quickly affirmed the recommendation of Wran and Kremser that the Klimt paintings not be returned. The committee did agree to return 16 Klimt drawings and 19 porcelain settings that had been donated by the family in 1948 as part of the consideration for export permits. Gehrer simultaneously announced her adoption of the committee's recommendations.

77. The other members of the committee were not given copies of the two opinions by Lintl, nor were they given most of Schoenberg's letters or informed of his request to see and respond to Kremser's opinion. Wran confirmed this when he informed Schoenberg of the committee's decision. The Bloch-Bauer heirs and their attorney had been purposely excluded from the entire decision-making process.

78. Not all of the committee members were in accord with Wran's tactics. Ilsebill Barta-Fliedl abstained from the vote and questioned the judgment and motives of the other members. Before the committee even discussed the matter she had been ordered by her superior, one of the government ministers, not to vote in favor of restitution in the Bloch-Bauer case. Apparently, the committee vote was predetermined by the Austrian government before the committee had even discussed the matter. The vote was a sham. At the end of the year, Barta-Fliedl resigned from the committee in protest. She has stated that it was clear from the first couple of meetings that the attitudes of the other members of the committee were inconsistent with the

purposes of the committee. The committee was made up of people who opposed art restitution in general and were especially hostile to the claims of Ferdinand's heirs.

The Law

79. Kremser's legal opinion, and therefore the committee's decision, was premised on the false assertion that Adele's will gave the AUSTRIAN GALLERY an ownership interest in the paintings. In coming to this conclusion, however, Kremser purposely misread Adele's will and expressly disagreed with all of the leading Austrian legal experts who have written on this precise legal issue in the last several years (before the Bloch-Bauer case arose). First, Adele's will merely expresses a request, but did not purport to obligate Ferdinand to make the donation. Second, even if Adele did purport to obligate Ferdinand, the obligation would not have been enforceable because the paintings belonged to Ferdinand.

80. In his 1994 article on "The Legacy of an Object Not Belonging to the Estate," Prof. Rudolf Welser, Director of the Institute for Civil Law at the University of Vienna, concluded:

> [The rule] that the testamentary disposition of an object not belonging to the estate is valid when the object belongs to an heir, does not apply in the case when the testator sets forth that the heir should upon his own death leave an object from his own separate property to a third party.

81. Adele's will reads as follows:

> I ask my husband after his death to leave my two portraits and the four landscapes of Gustav Klimt to the AUSTRIAN GALLERY.

82. In the estate files is a declaration dated January 1926 from Gustav Bloch-Bauer (Ferdinand's brother), the attorney for the estate, stating:

> It should be noted that the referenced Klimt paintings are not the property of the deceased testatrix, but of her husband.

83. The Klimt paintings were not included as part of Adele's estate during the course of the probate proceedings.

84. Thus, even if one were to conclude that Adele's request purported to obligate her husband, it is clear that her request was not a legal bequest, but was at most a "Legacy of an Object Not Belonging to the Estate" asking her husband Ferdinand to dispose of his own property in a certain way after his death. This wish, according to Prof. Welser and the other Austrian legal scholars, is, and was, unenforceable (as it would be under American law). To enforce such a request against the terms of Ferdinand's last will would violate and circumvent the strict laws regarding testamentary dispositions. And yet Kremser and Wran led the commission members to believe the exact opposite so that there would be no opposition to the government's pre-ordained decision not to return the paintings to Ferdinand's heirs.

Political Pressure

85. Schoenberg wrote to Gehrer to inform her of the committee's grave error and the denial of due process to Ferdinand's heirs. He recommended an arbitration process to resolve the dispute over the legal significance of Adele's will. Gehrer rejected this approach, stating that if the heirs believed the decision was wrong, their only remedy was to go to court. Gehrer also stated, contrary to all the facts that were available to her and in clear denial of what had transpired during the Nazi era, that "[t]he paintings were not stolen from Ferdinand Bloch-Bauer."

86. Clearly, even the one government minister who had proposed the new law, now found it politically impossible to continue. Her party, the conservative People's Party, faced difficult elections in October, 1999 where her party eventually came in third, behind even the far-right Freedom Party led by Jörg Haider, known for praising Nazi SS leaders as "men of character," and referring to Nazi death camps as "penal institutions." By rejecting the Bloch-Bauer's claims to the Klimt paintings, Gehrer joined in the Holocaust denial and revisionism that has reigned in certain circles in Austria since the end of the war. It is no surprise that she was rewarded for her "loyalty" and reappointed as a prominent minister in Austria's new right-wing coalition government.

Attempts To File An Austrian Lawsuit

87. In September, 1999, ALTMANN announced that she would file a lawsuit in Austria to vindicate her claim. However, the government had more in store for her. First, it

was necessary to apply for a waiver of the enormous court costs required to bring a lawsuit in Austria. These court costs are based on the value of the recovery that is sought and in this case would total several million dollars, far beyond what ALTMANN, who still works as a specialty dress supplier at age 84, can afford.

88. However, in November, 1999, the Austrian court granted ALTMANN and some of the other heirs only a partial waiver, and ruled that they were required to spend approximately $350,000 or all the assets at their disposal – essentially their entire life savings – in order to proceed. The Court ruled as follows:

> Given that the statutory rate for a claim valued at 2 billion shillings amounts to about 20 million, it is evident that the demonstrated income and assets of the plaintiffs do not permit them to bear all the expenses themselves. Of course, it is [also] evident from the findings that they must pay the amount set by the statute themselves to the extent they can be required to draw upon their assets. In particular, there is no reason to spare [the plaintiffs'] savings accounts at the expense of the general public [i.e., the Austrian State].

89. Not content with even this impossible ruling, in December, 1999 the Austrian government appealed the court's decision, arguing that the amount Mrs. Altmann and the other heirs should have to pay should include the value of the porcelain and drawings that were finally returned to them, after lengthy bureaucratic delays, in November, 1999.

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This appeal was rejected as moot because ALTMAN was unable to file the lawsuit in Austria.

The Treaty

90. In Article 26 of the Multilateral Austrian State Treaty of May 15, 1955, Austria promised:

> In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13th March, 1938, been subject to forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories.

91. Austria has failed to live up to its treaty obligations because it has refused to return the Klimt paintings to Ferdinand's heirs.

92. In his May 15, 1959 letter regarding the settlement of Article 26 claims for restitution, U.S. Ambassador to Austria H. Freeman Matthews concluded:

> My Government has instructed me to advise you that it may approach the Austrian Federal Government in the future in connection with the settlement of individual claims asserted under Article 26 of the State Treaty which are not presently known to my Government and do not

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> fall within the classes and categories of claims enumerated in paragraphs 1 and 2 of Section A of your note [which do not including artworks].

93. In other words, the U.S. reserved the right to assert unknown claims, such as the ones for the Bloch-Bauer's paintings. The fact that the Austrian government had misled the heirs and had falsified the provenance of the paintings was not revealed until last year, so these claims fall within the category of claims "not presently known" in 1959. Therefore, the United States has the ability to enforce ALTMANN's claims against the AUSTRIAN GALLERY.

94. In 1998, the U.S. Congress enacted and President Clinton signed the Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 18 (1998) which provides:

> TITLE II—WORKS OF ART SEC. 201. FINDINGS.
>
> Congress finds as follows:
>
> (1) Established pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art.
>
> (2) In the years since World War II, international sanctions against confiscation of works of art have been amplified through such

conventions as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which forbids the illegal export of art work and calls for its earliest possible restitution to its rightful owner.

(3) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.

(4) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

(5) Hence, the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust.

(6) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.

SEC. 202. SENSE OF THE CONGRESS REGARDING RESTITUTION OF PRIVATE PROPERTY, SUCH AS WORKS OF ART.

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Last Resort

95. As described above, Austria has failed to undertake good faith efforts to facilitate the return of the Klimt paintings that are the subject of this action, in the sense that would be required under the Holocaust Victims Redress Act.

96. ALTMANN alleges that she is essentially without any legal remedy in Austria for her claims. The new Austrian law purports to give victims no additional legal right to make claims for the return of artworks, although ALTMANN contends that under Austrian law she may enforce her right to an equal application of the law. However, in order to file an action in Austria challenging the decision of the minister, ALTMANN would be required to post an enormous cost bond equivalent to a percentage of the value of the paintings. ALTMANN requested a waiver of this bond requirement, which request was granted only in part, so that ALTMANN would be required to post a bond equal to all or most of her

assets other than her home before proceeding. ALTMANN cannot afford to proceed under these conditions in Austria. This court is the only reasonably available forum in which ALTMANN's claims can be heard and adjudicated.

97. Minister Gehrer has stated that she would follow a court's ruling on the enforceability of the request in Adele's will, and ALTMANN is informed and believes that the AUSTRIAN GALLERY will abide by the decision of an American court in this matter.

FIRST CAUSE OF ACTION
FOR DECLARATORY RELIEF
(28 U.S.C. 2201)

98. ALTMANN incorporates here by reference paragraphs 1 through 97.

99. A dispute has arisen between ALTMANN and the AUSTRIAN GALLERY concerning the Klimt paintings.

100. Pursuant to a law enacted by the REPUBLIC OF AUSTRIA in December 1998, all artworks which were objects of restitution after the War and which were donated to the AUSTRIAN GALLERY in connection with a request for export permits, or were never properly restituted and were subsequently obtained by the AUSTRIAN GALLERY, must be returned to their original owners or their heirs. However, the AUSTRIAN GALLERY has refused to return the Klimt paintings to ALTMANN and the other heirs of Ferdinand Bloch-Bauer. On June 28, 1999, the federal minister who governs the AUSTRIAN GALLERY, Elisabeth Gehrer,

decided against restitution of the Klimt paintings mentioned in Adele's will to Ferdinand's heirs. On July 12, 1999, Gehrer wrote to ALTMANN's attorney stating that if the heirs continued to believe that the artworks were stolen, they should take their dispute to court. Thus, the issues in this case are ripe for declaratory relief.

101. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that Adele Bloch-Bauer's will did not give the AUSTRIAN GALLERY an enforceable right to inherit or obtain title to the six Klimt paintings before or after Ferdinand's death.

102. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that Ferdinand Bloch-Bauer's purported oral promises and actions prior to 1938, including the donation of one painting in 1936, did not give the AUSTRIAN GALLERY an enforceable right to inherit or obtain title to the other five Klimt paintings before or after Ferdinand's death.

103. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that the six Klimt paintings mentioned in Adele's will were legally the sole property of Ferdinand, and not Adele, at the time of Adele's death.

104. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that any request in Adele's will or any purported intention by Ferdinand prior to 1938, with regard to a donation of the Klimt paintings to the AUSTRIAN GALLERY, is unenforceable because the implied condition underlying it — namely, the ability of the Bloch-Bauer family

to live in Austria — was unalterably changed by the events that transpired after March 1938.

105. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that six Klimt paintings — *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl* — were stolen from Ferdinand by the Nazis in violation of international law.

106. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that none of the actions taken by Dr. Führer and Ferdinand during the War (between March 1938 and May 1945), gave the AUSTRIAN GALLERY the right to inherit or obtain title to the six Klimt paintings taken from Ferdinand's collection during the War.

107. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that the six Klimt paintings stolen from Ferdinand by the Nazis were subject to restitution to Ferdinand after the end of the War in May, 1945.

108. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that the six Klimt paintings stolen from Ferdinand by the Nazis were subject to restitution to Ferdinand's heirs after Ferdinand's death in November, 1945.

109. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that five of the six Klimt paintings stolen from Ferdinand — with the sole exception of the portrait of *Amalie Zuckerkandl* — were the subject of restitution proceedings from 1945 through 1948.

110. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that all of the recovered artworks from the collection of Ferdinand Bloch-Bauer, including the Klimt paintings, were or would have been subject to export permit restrictions imposed by the Federal Monument Agency in conjunction with the AUSTRIAN GALLERY.

111. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that proceedings concerning export permits for all of the recoverable artworks from the collection of Ferdinand Bloch-Bauer, including the Klimt paintings, were initiated prior to the purported "donation" of the Klimt paintings by Dr. Rinesch to the AUSTRIAN GALLERY on April 10 or 12, 1948.

112. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that in the course of seeking export permits for other portions of the collection, five of the Klimt paintings were purportedly "donated" to the AUSTRIAN GALLERY by Dr. Rinesch.

113. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that ALTMANN never authorized any purported "donation" of Klimt paintings to the AUSTRIAN GALLERY.

114. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that ALTMANN was never obligated to transfer any of the Klimt painting to the AUSTRIAN GALLERY.

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115. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that any purported "donation" of Klimt paintings to the AUSTRIAN GALLERY was made without proper authorization from ALTMANN.

116. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that any purported "donation" of Klimt paintings to the AUSTRIAN GALLERY was made under economic duress, and the threat by the Federal Monument Agency and the AUSTRIAN GALLERY of withholding export permits from the heirs.

117. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that any purported "donation" by Dr. Rinesch of Klimt paintings to the AUSTRIAN GALLERY was made under the mistaken belief that the AUSTRIAN GALLERY had a valid legal claim to the Klimt paintings.

118. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that the AUSTRIAN GALLERY was responsible for the mistaken belief which resulted in the purported "donation" of the Klimt paintings by Dr. Rinesch to the AUSTRIAN GALLERY by withholding records and misstating facts.

119. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that ALTMANN is entitled to rescission of the purported "donation" by Rinesch of the Klimt paintings to the AUSTRIAN GALLERY.

120. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that the Klimt painting of *Amalie*

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Zuckerkandl was donated to the AUSTRIAN GALLERY by Vita Künstler in 1988, and is subject to restitution to the heirs of Ferdinand Bloch-Bauer.

121. ALTMANN contends, and the AUSTRIAN GALLERY disputes, that under the new law enacted by Austria, ALTMANN is entitled to recover the following six Klimt paintings in the AUSTRIAN GALLERY: *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl.*

122. Wherefore ALTMANN prays for a declaration affirming ALTMANN's view of the aforementioned factual and legal issues. Resolution of these issues will allow ALTMANN to obtain restitution of the artworks from the AUSTRIAN GALLERY. Minister Gehrer has stated and has been quoted in the *New York Times* as saying that she will follow a court decision on the factual and legal issues involved in this matter. Furthermore, Minister Gehrer has written to ALTMANN's attorney that the heirs should seek relief in court if they feel aggrieved by her decision. Additionally, the United States has the ability under its treaty with Austria to enforce the judgment of this court declaring that ALTMANN in entitled to restitution of the Klimt paintings.

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SECOND CAUSE OF ACTION
FOR REPLEVIN

123. ALTMANN incorporates here by reference paragraphs 1 through 97.

124. After Ferdinand's death in November, 1945, ALTMANN was entitled to recover possession of the six Klimt painting: *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl.*

125. The AUSTRIAN GALLERY unlawfully withheld possession from ALTMANN of the three Klimt paintings taken during the War.

126. The AUSTRIAN GALLERY unlawfully obtained possession of two paintings based on false claims of ownership and duress.

127. The AUSTRIAN GALLERY obtained ownership of one further painting, *Amalie Zuckerkandl*, in 1988, and thereafter made false claims of provenance for the painting which hid the true fact that it was stolen from Ferdinand Bloch-Bauer and rightfully belonged to ALTMANN and his other heirs.

128. ALTMANN and the other heirs made reasonable efforts to reclaim their inheritance, but despite such efforts, ALTMANN did not learn, and could not reasonably have learned, of the facts revealing the false ownership claims until 1999.

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129. ALTMANN has been damaged by the deprivation of her property, and is entitled to either a recovery of the property or payment of her interest in the paintings, which interest is valued at approximately $150 million and will be subject to proof at trial.

THIRD CAUSE OF ACTION
FOR RESCISSION

130. ALTMANN incorporates here by reference paragraphs 1 through 97.

131. The AUSTRIAN GALLERY claims that ALTMANN, or the attorney purporting to represent her, Dr. Rinesch, agreed in April 1948 to acknowledge the request in Adele's will and effectively "donated" five of the six Klimt paintings referenced in Adele's will to the AUSTRIAN GALLERY.

132. ALTMANN alleges that any purported "donation" of the Klimt paintings to the AUSTRIAN GALLERY was made by mistake, or under duress, or without authority from ALTMANN.

133. At the time of the purported "donation," Dr. Rinesch and Ferdinand's heirs were under the mistaken belief that Adele and Ferdinand had legally donated the Klimt paintings to the AUSTRIAN GALLERY. The AUSTRIAN GALLERY was responsible for this mistaken belief, knew that Ferdinand's heirs and Dr. Rinesch held the mistaken belief, and knew that it was false at the time of the purported donation in April 1948.

134. At the time of the purported "donation," ALTMANN was under severe economic duress, having been deprived of all her property taken by the Nazis, as well as her inheritance. The AUSTRIAN GALLERY was responsible for this duress because it purposely withheld property from the heirs and conspired with the Federal Monument Agency to delay the granting of export permits for artworks belonging to the heirs.

135. At the time of the purported "donation," Dr. Rinesch was not authorized to act on ALTMANN's behalf.

136. As a result, ALTMANN is entitled to rescind the purported "donation" and recover the donated artworks from the AUSTRIAN GALLERY.

FOURTH CAUSE OF ACTION
FOR DAMAGES FOR EXPROPRIATION
AND CONVERSION

137. ALTMANN incorporates here by reference paragraphs 1 through 97.

138. After Ferdinand's death in November, 1945, ALTMANN was entitled to recover possession of the six Klimt paintings: *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl.*

139. The AUSTRIAN GALLERY unlawfully withheld possession from ALTMANN of the three Klimt paintings taken during the War.

140. The AUSTRIAN GALLERY unlawfully obtained possession of two paintings based on deceitful and false claims of ownership and duress, and through an unauthorized "donation" obtained from Dr. Rinesch as a result of those deceitful and false claims and duress.

141. The AUSTRIAN GALLERY obtained ownership of one further painting, *Amalie Zuckerkandl*, in 1988, and thereafter made false claims of provenance for the painting which hid the true fact that it was stolen from Ferdinand Bloch-Bauer and rightfully belonged to ALTMANN and his other heirs.

142. ALTMANN did not learn, and could not reasonably have learned, of the facts revealing the false ownership claims until 1999.

143. ALTMANN has been damaged by the conversion of her property, and is entitled to either a recovery of the property, or payment of her interest in the paintings, which interest is valued at approximately $150 million and will be subject to proof at trial.

FIFTH CAUSE OF ACTION
FOR DAMAGES FOR VIOLATION OF
INTERNATIONAL LAW

144. ALTMANN incorporates here by reference paragraphs 1 through 97.

145. The AUSTRIAN GALLERY violated international law by knowingly participating in and profiting from the Nazi

persecution of Ferdinand Bloch in the following ways: (1) the AUSTRIAN GALLERY assisted in the systematic looting of the property of Ferdinand Bloch-Bauer; (2) the AUSTRIAN GALLERY obtained artworks belonging to Ferdinand Bloch-Bauer during the War; (3) the AUSTRIAN GALLERY refused to return artworks to Ferdinand Bloch-Bauer and his heirs after the War; (4) the AUSTRIAN GALLERY used duress and deceit to obtain artworks that should have been restituted to Ferdinand's heirs during the post-war period, and (5) the AUSTRIAN GALLERY concealed its misdeeds from the heirs until they were exposed in 1998-99.

146. As determined by the United States Congress in Title II of the Holocaust Victims Redress Act of 1998, the above referenced actions by the AUSTRIAN GALLERY were in violation of numerous international treaties, customary international laws, and fundamental human rights laws prohibiting war crimes, including, or as reflected by the United Nations Charter, the Universal Declaration of Human Rights, the Geneva Convention of 1929, the supplemental Geneva Convention of the Treatment of Non-Combatants During World War Time, the Nuremberg Principles, the Covenant on Civil and Political Rights, and the Hague Convention of 1907.

147. As a result of the above referenced violations of international law, ALTMANN has suffered injury and is entitled to judgment, against the AUSTRIAN GALLERY on this cause of action for compensatory damages in an amount to be determined by the Court.

SIXTH CAUSE OF ACTION
FOR IMPOSITION OF A CONSTRUCTIVE TRUST

148. ALTMANN incorporates here by reference paragraphs 1 through 97.

149. The AUSTRIAN GALLERY obtained the Klimt paintings from Ferdinand Bloch-Bauer and his heirs through violations of international law, duress and deceit.

150. The AUSTRIAN GALLERY has wrongfully detained the Klimt paintings from ALTMANN now that the facts have come to light.

151. As a result, ALTMANN is entitled to the imposition of a constructive trust on the Klimt paintings, obligating the AUSTRIAN GALLERY to return the Klimt paintings to ALTMANN, or to compensate her fairly for their loss.

SEVENTH CAUSE OF ACTION
FOR RESTITUTION BASED ON
UNJUST ENRICHMENT

152. ALTMANN incorporates here by reference paragraphs 1 through 97.

153. As described above, the AUSTRIAN GALLERY has been unjustly and unlawfully enriched at the expense of Ferdinand Bloch-Bauer and his heirs. The AUSTRIAN GALLERY obtained the Klimt paintings from Ferdinand Bloch-Bauer and his heirs through violations of international law, duress and deceit, and has wrongfully withheld the paintings from ALTMANN.

154. As a result of the AUSTRIAN GALLERY's unjust enrichment, ALTMANN is entitled to restitution of the Klimt paintings to her, or the reasonable value thereof.

EIGHTH CAUSE OF ACTION FOR DISGORGEMENT OF PROFITS PURSUANT TO CAL. BUSINESS & PROFESSIONS CODE § 17200 ET SEQ.

155. ALTMANN incorporates here by reference paragraphs 1 through 97.

156. The AUSTRIAN GALLERY has engaged in unlawful and unfair business practices by displaying the looted Klimt paintings in its museum.

157. For almost 60 years, the AUSTRIAN GALLERY has unjustly and unfairly profited from the display of the looted Klimt paintings by obtaining entrance fees and selling concessions and memorabilia to museum visitors, including ones form California, who would not have otherwise visited the museum or made such purchases were it not for the presence of the Klimt paintings in the museum. One of the Klimt paintings, *Adele I*, appears on the cover of the AUSTRIAN GALLERY's official guidebook to the museum. Thousands of visitors each year come to the museum for the sole reason of viewing the looted Klimt paintings that were taken from Ferdinand Bloch-Bauer and unlawfully and improperly detained from his heirs.

158. As a result, the Court should require an accounting of the ill-gotten gains of the AUSTRIAN GALLERY, and

order that those illicit profits be disgorged and paid to ALTMANN, who could have earned those profits were it not for the unfair practices of the AUSTRIAN GALLERY.

PRAYER

WHEREFORE, MARIA V. ALTMANN prays relief as follows:

1. For a declaration that ALTMANN's contentions of fact and law set forth in the First Cause of Action are correct.

2. For an order directing the AUSTRIAN GALLERY to return the six Klimt paintings — *Adele Bloch-Bauer I; Adele Bloch-Bauer II; Beechwood; Apple Tree I; Houses in Unterach am Attersee;* and *Amalie Zuckerkandl* — to ALTMANN and the heirs of Ferdinand Bloch-Bauer, or to compensate them for the current value of those artworks.

3. For an order rescinding the purported "donation" of five of Ferdinand's Klimt paintings to the AUSTRIAN GALLERY and directing the AUSTRIAN GALLERY to return the artworks to ALTMANN and the heirs of Ferdinand Bloch-Bauer, or compensate them for their share of the current value of those artworks.

4. For an award of damages in the amount of ALTMANN's interest in the artworks converted by the AUSTRIAN GALLERY, in an amount to be proven at trial, but estimated at $150 million.

5. For further compensatory damages for the AUSTRIAN GALLERY's violations of international law.

Appendix H

6. For an accounting of the ill gotten gains of the AUSTRIAN GALLERY, and an order that those illicit profits be disgorged and paid to ALTMANN.

7. For pre- and post-judgment interest on any award.

8. For such other and further relief that the Court deems just and appropriate.

DATED: August __, 2000

Law Offices of E. Randol Schoenberg

By: _____
E. Randol Schoenberg
Attorney for Plaintiff
MARIA V. ALTMANN

APPENDIX I — DECLARATION OF DR. WALTER FRIEDRICH DATED FEBRUARY 1, 2001

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No.: 00-08913 FMC (AIJx)
[The Honorable Florence-Marie Cooper]

MARIA V. ALTMANN, an individual

Plaintiff,

v.

REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY, an agency of the REPUBLIC OF AUSTRIA,

Defendants.

Appendix I

Declaration of Dr. Walter Friedrich in Support of Defendants' Motion to Dismiss Under Rule F.R.Civ.P. 12(b)

[Filed concurrently with Defendants' Motion to Dismiss Under Fed.R.Civ.P. 12(b); Memorandum of Points and Authorities in Support Thereof]

DATE: March 19, 2001
TIME: 10:00 a.m.
CTRM: 750, Roybal Federal Building
255 E. Temple Street
Los Angeles, CA 90012

Complaint Filed: August 22, 2000

I, DR. WALTER FRIEDRICH declare as follows:

I. INTRODUCTION

A. *Qualifications*

1. I am a member of the Austrian Bar. I obtained my doctorate in law from the University of Vienna in 1975. I am a former judge of an Austrian regional court and was specially assigned to the Austrian Supreme Court for more than ten years. I am currently in private practice. My resume is annexed hereto as Exhibit 1.

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B. *Assignment*

2. I make this Declaration at the request of the attorneys for defendants the Republic of Austria, a foreign state, and the Austrian Gallery, which is officially called Österreichische Galerie Belvedere ("Defendants") in support of Defendants' Motion to Dismiss the Complaint of plaintiff Maria V. Altmann ("Plaintiff"). In particular, I have been asked to describe (1) the legal framework that was created in post-World War II Austria by the Allies and the Republic of Austria for the restitution of property taken from Jews and other persecuted groups by Nazi Germany during its occupation of Austria; (2) some aspects of the Austrian court system, that is to say regarding the independence of the judicial branch from the executive branch of the Austrian government and questions of enforceability of foreign judgments and (3) the procedure employed by Austrian courts today in determining the appropriate amount of court fees to be paid by claimants in civil matters and, more specifically, how that procedure was applied to Plaintiff's petition for legal aid before the Provincial Court for Civil Law Matters in Vienna. I make this Declaration based upon my own personal knowledge and research.

C. *Summary of Findings*

3. In carrying out the assignment discussed above, I have concluded that (1) since the liberation of Austria by the Allied Forces in 1945, it has been anticipated by the United States and Austria, and it continues to be the expectation of those sovereign states today, that Austria retains sole responsibility for adjudicating restitution claims

relating to property allegedly expropriated in Austria during its Nazi occupation ; and (2) Plaintiff has an available forum for her claims in Austria and the amount of court fees imposed on Plaintiff pursuant to her petition for legal aid before the Austrian court was significantly less than the fees that ordinarily would be imposed according to the standard formula under the applicable Austrian statute.

II. THE LEGISLATIVE AND DIPLOMATIC FRAMEWORK ESTABLISHED BETWEEN AUSTRIA AND THE UNITED STATES FOLLOWING WORLD WAR II PROVIDES FOR AUSTRIAN RESPONSIBILITY FOR ADJUDICATION OF RESTITUTION CLAIMS FOR PROPERTY ALLEGEDLY EXPROPRIATED DURING THE NAZI OCCUPATION

A. *1918 to 1938: The Inter-War Period*

4. Until the end of World War I, Austria, or, more specifically, the Austro-Hungarian Empire, was a major European power. By the Peace Treaty of St. Germain of 1919, Austria was reduced to a size of 83,000 square kilometres with only 6 million inhabitants. Post-war Austria made the transition from a monarchy to a republican constitutional system — the last Habsburg Emperor abdicated, and nobility and its privileges were abolished by 1919. Austria remained an independent democratic republic from the end of 1918 until its invasion and occupation by Nazi Germany in 1938.

B. *1938 to 1945: The Nazi Period*

5. On March 13, 1938, five years after their rise to power in Germany, the Nazis invaded Austria by force in the so-called "Anschluss," Austria was claimed to be the "Ostmark" region of Germany, and Austria ceased to be free and independent and became an occupied nation. The General Civil Code of Austria (ABGB), a codification of Austrian family, property, inheritance and obligations law dating back to 1811, remained in effect during the period of occupation. However, Nazi Germany enacted a multitude of anti-Jewish laws and regulations, including laws that mandated the registration of Jewish assets, that prohibited the purchase or unrestricted sale of artwork by Jews, and that provided for the escheat of Jewish assets to the German Reich upon the demise of the Jewish owners.

C. *1945 to 1955: The Post-War Period*

6. In April, 1945, with Austria's liberation by the Allies, a democratic Austria was reborn. The Austrian Proclamation of Independence was issued, a provisional, democratic Austrian Government was created, and the provisional government declared its chief goals of rebuilding Austria, eliminating all vestiges of the Third Reich's Nazi policies, and obtaining the trust and confidence of the Allies. See Neuhold et al., Österreichisches Handbuch des Völkerrechts (Austrian Handbook of Public International Law) 502 ¶ 2718 (1997).

7. On May 8, 1945, Nazi Germany surrendered and World War II ended in Europe. The provisional Austrian

Government immediately set about to enact legislation providing for the restitution of property seized in Austria pursuant to Nazi aryanization and other discriminatory laws. The United States occupation forces and the World Jewish Congress supervised the drafting of the Austrian restitution legislation, and anticipated that the Republic of Austria would control the restitution process.

8. On May 10, 1945, less than two weeks after issuing its Proclamation of Independence, the Austrian Government enacted the Law Regarding the Registration of Aryanized Property and Other Property Taken in Connection with the National Socialist Takeover of Power (Gesetz 10.5.1945 StGBl 10 über die Erfassung arisierter und anderer im Zusammenhang mit der nationalsozialistischen Machtübernahme entzogenen Vermögenschaften). That legislation, together with the ordinance implementing it, mandated the registration of all property and property rights that were taken after March 13, 1938, from their owners in connection with the Nazi assumption of power. Under penalty of imprisonment, the current holders of the property were required to report it to the designated Austrian authorities. The dispossessed owners were at liberty to file similar reports. On May 15, 1946, the Austrian National Assembly enacted the Federal Act Concerning the Declaration as Null and Void of Contracts and Other Legal Transactions That Took Place During the German Occupation of Austria (Bundesgesetz vom 15.5.1946 BGBl 106 über die Nichtigerklärung von Rechtsgeschäften und sonstigen Rechtshandlungen, die während der deutschen Besetzung Österreichs erfolgt sind).

9. Further restitution legislation included: (a) the First Restitution Act of July 26, 1946 (Bundesgesetz vom 26. Juli 1946 BGBl 156 über die Rückstellung entzogener

Vermögen, die sich in Verwaltung des Bundes oder der Bundesländer befinden (Erstes Rückstellungsgesetz)), which provided for the return of assets that were confiscated by the Third Reich and that were under administration by offices of the Republic of Austria or the federal Austrian states; (b) the Second Restitution Act of February 6, 1947 (Bundesgesetz vom 6. Februar 1947 BGBl 53 über die Rückstellung entzogener Vermögen, die sich im Eigentum der Republik Österreich befinden (Zweites Rückstellungsgesetz)), which provided for the return of assets that had become the property of the Republic of Austria by forfeiture; and (c) the Third Restitution Act of February 6, 1947 (Bundesgesetz vom 6. Februar 1947 BGBl 54 über die Nichtigkeit von Vermögensentziehungen (Drittes Rückstellungsgesetz)), which declared null and void acts of dispossession in connection with the Nazis' assumption of power and provided for the return of such dispossessed property to the original owner. Section 15 of the Third Restitution Act specifically provided that Austrian Restitution Commissions would have exclusive jurisdiction to decide any claims under the Act.

10. Between May 1947 and July 1949, the Austrian government enacted four additional restitution laws addressing: (a) restitution of firm names that had been changed or extinguished under Nazi duress (Fourth Restitution Act of May 21, 1947) (Bundesgesetz vom 21. Mai 1947 BGBl 143 betreffend die unter nationalsozialistischem Zwang geänderten oder gelöschten Firmennamen (Viertes Rückstellungsgesetz)); (b) restitution of assets taken from juridical persons that had lost their existence under Nazi duress (Fifth Restitution Act of June 22, 1949) (Bundesgesetz vom 22. Juni 1949 BGBl 164 über die Rückstellung entzogenen Vermögens juristischer

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Personen des Wirtschaftslebens, die ihre Rechtspersönlichkeit unter nationalsozialistischem Zwang verloren haben (Fünftes Rückstellungsgesetz)); (c) restitution of trademarks, copyrights and patents (Sixth Restitution Act of June 30, 1949) (Bundesgesetz vom 30. Juni 1949 BGBl 199 über die Rückstellung gewerblicher Schutzrechte (Sechstes Rückstellungsgesetz)); and (d) restitution of claims arising out of private employment contracts (Seventh Restitution Act of July 14, 1949) (Bundesgesetz vom 14. Juli 1949 BGBl 207 über die Geltendmachung entzogener oder nicht erfüllter Ansprüche aus Dienstverhältnissen in der Privatwirtschaft (Siebentes Rückstellungsgesetz)).

D. *The Austrian State Treaty of 1955*

11. On May 15, 1955, the United States, the USSR, Great Britain, France and Austria executed the Austrian State Treaty. The Preamble of the Treaty recognized that "on 13th March, 1938, Hitlerite Germany annexed Austria by force and incorporated its territory in the German Reich" and that "in the Moscow Declaration published on 1st November, 1943, the Governments of the Union of Soviet Socialist Republics, the United Kingdom and the United States of America declared that they regarded the annexation of Austria by Germany on 13th March, 1938, as null and void and affirmed their wish to see Austria re-established as a free and independent State." Since Austria was not regarded as a defeated Axis ally, but rather as a liberated country, the treaty was expressly considered a "State treaty," as opposed to a "peace treaty" of the type entered between the United States and Germany or the other Axis Powers. A true and correct copy of the State Treaty is attached hereto as Exhibit 2.

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12. In Article 1, the State Treaty re-established Austria "as a sovereign, independent and democratic State." Article 21 provided that "[n]o reparation shall be exacted from Austria arising out of the existence of a state of war in Europe after 1st September, 1939." Article 26 governing property, rights, and interests of minority groups in Austria, provided that:

> 1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13th March, 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories. Where return or restoration is impossible, compensation shall be granted for losses incurred by reason of such measures to the same extent as is, or may be, given to Austrian nationals generally in respect of war damage.
>
> 2. Austria agrees to take under its control all property, legal rights and interests in Austria of persons, organizations or communities which, individually or as members of groups, were the object of racial, religious or other Nazi measures of persecution where, in the case of persons, such property, rights and interests remain heirless or unclaimed for six months after the coming into force of the present Treaty, or where in the case of organizations and communities such organizations

or communities have ceased to exist. Austria shall transfer such property, rights and interests to appropriate agencies or organizations to be designated by the Four Heads of Mission in Vienna by agreement with the Austrian Government to be used for the relief and rehabilitation of victims of persecution by the Axis Powers, it being understood that these provisions do not require Austria to make payments in foreign exchange or other transfers to foreign countries which would constitute a burden on the Austrian economy. Such transfer shall be effected within eighteen months from the coming into force of the present Treaty and shall include property, rights and interests required to be restored under paragraph 1 of this Article.

13. The 1955 State Treaty was actively negotiated for nearly 10 years with continued revision and comment from the United States occupation forces and the World Jewish Congress. It is generally accepted that Austria fulfilled its obligations under Article 26(1) by the enactment of, inter alia, the various restitution laws described above. See Adamovich, Handbuch des österreichischen Verfassungsrechts (Handbook of Austrian Constitutional Law) 42 (1971).

14. By virtue of its ratification of the Treaty, the United States recognized Austria's responsibility and authority to return property falling within Article 26(1) and to arrange for the disposition of unclaimed property. It is my opinion that any issue relating to ownership or possession of such property may only be resolved by the Austrian authorities, whereas the other parties to the Treaty could advance or support such issues only on a state-to-state level.

15. In 1959, the United States and Austria entered into an agreement, memorialized in an exchange of diplomatic notes, that clarified the application of Austria's obligations under Article 26. U.S.-Austria Exchange of Notes Constituting an Agreement Concerning the Settlement of Certain Claims Under Article 26 of Austrian State Treaty, May 8-22, 1959, 10 U.S.T. 1158, 347 U.N.T.S. 3 (the "1959 Agreement"). The United States states in Section B(a) of the 1959 Agreement that:

> . . . after establishment of the Fund provided for under Point I with by-laws as set forth in the attached draft, and after the coming into force of the legislative measures designated above under Point II - in so far as satisfactory settlements are not reached - and under Points III and V, [the United States] will neither advance nor support through diplomatic channels against the Austrian Federal Government, any further claims of persecutees based on Article 26 of the State Treaty originating from the seizure, sequestration, confiscation, control or forced transfer of properties, legal rights and interests in Austria during the time after March 13, 1938 which come within the classes and categories enumerated in paragraphs 1 and 2 of Section A of this note [which, to the best knowledge of the United States, comprised all outstanding categories of claims for the restitution or restoration of properties, legal rights and interests of persecutees in Austria which were seized, confiscated, sequestrated, taken

under control or forcibly transferred during the time after March 13, 1938].

The 1959 Agreement constitutes a waiver by the United States of its rights under Article 26 to support private claims by diplomatic means and supports my conclusion that the parties to the State Treaty understood that document to provide the exclusive means of resolving claims subject to Article 26. A true and correct copy of the 1959 Agreement is attached hereto as Exhibit 3.

16. The United States government has expressly acknowledged the exclusive jurisdiction of the appropriate Austrian authorities in correspondence with potential claimants. *See* letter dated January 1950 from Francis E. Flaherty for the United States Secretary of State to a claimant, a true and correct copy of which is attached hereto as Exhibit 4 (stating that "a claim should be filed directly with the designated authorities in accordance with the provisions of the laws" and that "[t]hese laws apply to property regardless of the nationality of the property owners"); letter dated March 1950 from Francis E. Flaherty for the United States Secretary of State to a claimant, a true and correct copy of which is attached hereto as Exhibit 5 (stating that "[t]he restitution of property in Austria comes wholly within the purview of the Austrian Restitution courts").

E. *Further Austrian Restitution and Compensation Laws*

17. Austria's implementation of further restitution and compensation laws has been ongoing and continuous. Only the most significant of those laws are mentioned here:

18. On March 13, 1957, pursuant to Article 26 of the State Treaty, Austria enacted the Reception Organizations Act BGBl 73, as amended, which established two legal bodies known as Assembly Centers (Sammelstellen A und B). The Act assigned all stale restitution claims to the Assembly Centers, whose task it was to collect and realize assets taken during the Nazi period which had not been claimed after the war in accordance with the provisions of the Restitution Acts. The managers enacted provisions for distribution of the funds collected, which included compensation to Jewish individuals persecuted by the Nazis. The remaining 28% of the funds of Assembly Center A went to Israel, the United States, and Jewish communities in Austria for collective purposes.

19. On January 18, 1956, Austria established a compensation program, the "Aid Fund" for Political Persecutees Who Have Their Domicile and Permanent Residence Abroad (Fonds zur Hilfeleistung an politisch Verfolgte, die ihren Wohnsitz und ständigen Aufenthalt im Ausland haben, "Hilfsfonds") (BGBl 25). The Aid Fund distributed money received from the Austrian Government, upon application, to Nazi victims from Austria who had emigrated and lived abroad. Applications under the Aid Fund Act were solicited through numerous advertising campaigns abroad. By July 1961, the Austrian government had paid out the entire 550 million Austrian Schilling originally allocated to the fund. Beginning in 1962, the fund was restocked with another 600 million Austrian Schilling, for a total which would be equivalent to $300 million in today's dollars. By amendment dated December 13, 1976, the Austrian Government furnished another 440 million Austrian Schilling to be distributed to victims of Nazi persecution (BGBl 714).

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20. The Victims Welfare Law (OFG), which was passed in 1945 and re-enacted in 1947, has been amended more than 60 times and remains in force. That legislation provided life-long benefits to many classes of persons who were citizens or residents of Austria at the time of the Nazi occupation, including persons who resisted the Nazis by fighting for a free and democratic Austria, and persons who suffered "considerable losses" due to political reasons or reasons of origin, religion or nationality, as a result of unjust actions by courts, police or other authorities, or by action of the National Socialist German Workers Party. The legislation also allowed for claims by family members and relatives of victims who died under Nazi persecution.

21. The Act on Property Damage Caused by War and Persecution (KVSG, BGBl 1958/127) provided compensation to persons who lost or suffered damage to household property or property necessary to carry out a job within Austria as a result of the war or as a result of persecution by the Nazis.

22. The Federal Law of 26th October 1960 (BGBl 1960/222) provides for a one-time payment of 30 million Austrian Schilling and permanent annual allowances, beginning retroactively in 1958, to Austrian Jewish communities.

23. The First and the Second Artistic and Cultural Assets Settlement Act of 27 June 1969 and of 13 December 1985 concern the settlement of ownership of unclaimed works of art and cultural objects in the custody of the Federal Monument Office. Potential claimants were invited to file

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their claims and, in case they were denied, had the opportunity to initiate a court proceeding. In October 1996, approximately 8,000 remaining items, of which the original owners or their legal heirs could not be located, were auctioned off by Sotheby's ("Mauerbach Auction"). The proceeds of 155 million Schilling were transferred to the Jewish Community in Austria.

24. The Honorary Gifts Law (BGBl 1988/197), passed on the 50th anniversary of the occupation, provided for honorary gifts and payments to resistance fighters and victims of Nazi persecution in Austria.

25. In 1995, in connection with the 50th anniversary of the end of World War II, Austria enacted the Republic of Austria's National Fund Law (BGBl 1995/432), which provided benefits to persons who were persecuted by the Nazi regime on political grounds, on grounds of origin, religion, nationality or sexual orientation, on the basis of a physical or mental handicap, or on the basis of the accusation of so-called (by the Nazis) "asociality," or who in other ways became victims of Nazi wrongdoing or left the country to avoid such persecution. As of April 28, 1997, the fund had paid basic compensation amounts to each of 12,610 claimants, most of them living in the United States, Israel, Austria, and Great Britain.

26. On December 4, 1998, Austria enacted the Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections, authorizing the Minister of Finance to return artworks in special instances enumerated in the Statute, where claims could otherwise not

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be made. It was pursuant to this legislation that an advisory board was established to advise the Austrian government as to the disposition of particular artworks, including the Klimt paintings at issue in this litigation. A true and correct copy of the 1998 Statute, together with a certified English translation, is attached hereto as Exhibit 6. It must be noted that section 2(2) of the Statute expressly states that it does not grant the claimants any enforceable rights. The Austrian Supreme Court (OGH), however, ruling on such a clause in a statute dealing with subsidies to be granted to Austrian businesses by the Austrian Chamber of Commerce, has held that the denial of the subsidy is nevertheless subject to judicial review under a doctrine which scholars call "effect of constitutional rights on third parties," those rights being so fundamental under the Austrian Constitution that even a statutory clause like the one mentioned above cannot dispense with them (*see* OGH 26th Jan. 1995, 6 Ob 514/95). Therefore, if the Minister's ruling was discriminatory, it could be challenged in the Austrian courts by Plaintiff, arguing that the above-mentioned OGH decision is controlling. Indeed this view was relied on heavily in Plaintiff's Austrian complaint drafted by her Austrian attorney Dr Gulner, a true and correct copy of which, together with a certified English translation, is attached hereto as Exhibit 7.

27. During the past two years, negotiations on matters of restitution have continued between Austria and many other countries, including the United States. As recently as October 24, 2000, an agreement addressing compensation for persons who performed forced labor in Austrian territory during the Nazi occupation was signed by the United States and Austria. It establishes the Austrian Fund for Reconciliation, Peace

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and Cooperation, which covers those claims, and the signatory parties agreed that it would be in their interest for the Fund to be the exclusive remedy and forum for the resolution of all those claims. The Austrian law implementing this agreement has been in force since November 27, 2000.

28. Most recently, negotiations between the United States and Austria reached a climax on 17th January 2001 with the signing of a Joint Statement. A true and correct copy of the Joint Statement dated January 17, 2001, is attached hereto as Exhibit 8. The purpose of the Statement is to achieve legal closure and all-embracing and enduring legal peace with respect to all claims related to the Nazi era or World War II against Austria and/or Austrian companies, as defined in Annex B to the Statement (which definition includes the Austrian Gallery). To that end a General Settlement Fund will be established and funded by Austria, and it shall be the exclusive forum for all claims except those falling within the above-mentioned Reconciliation Fund. Only in rem claims for works of art are expressly excluded from participating in the General Settlement Fund; they are addressed in Annex A §5 to the Statement, which sets forth that art restitution will proceed on an expedited basis pursuant to the Austrian Federal Law of December 4, 1998, which I have mentioned supra. This most recent Joint Statement shows, in my view, that a) all claims relating to works of art other than in rem claims are exclusively to be brought before the General Settlement Fund and b) in rem claims for works of art are properly before the Austrian Federal Minister for Education and Cultural Affairs (whose correct title as of February 1, 2000, is Federal Minister for Education, Science

and Culture) and her advisory board under the 1998 Statute. The Joint Statement confirms my opinion US courts should not review decisions made by the competent Austrian authorities under the 1998 Statute.

III. ASPECTS OF THE AUSTRIAN COURT SYSTEM

A. *Independence of the Judiciary from the Executive Branch of the Government*

29. According to Art. 94 of the Austrian Constitution (B-VG), judicial and administrative powers are separate at all levels of proceedings. Judges are independent in the exercise of their judicial office (Art 87 B-VG). No one may be deprived of his lawful judge (Art 83). The law on the organization of the courts prescribes an age limit (presently 65 years) upon whose attainment judges retire automatically. Otherwise there is no time limit for the tenure of their office and they may be removed only in the cases and ways prescribed by law and by a formal judicial decision (Art. 88). Hearings in civil and criminal cases are oral and public (Art 90). According to those provisions of the Constitution and to my knowledge and experience, the Austrian courts enjoy sufficient freedom from the executive branch of the government to enable them to act independently. The Austrian courts, most prominently among them the OGH, have always guarded their independence vigorously and rendered numerous decisions against the executive branch. In my view, they would be able to independently find facts and decide Plaintiff's claims in strict accordance with the applicable law.

B. *Enforcement of Foreign Judgments*

30. Austrian courts must not enforce judgments of courts sitting outside the European Union, unless the contrary is provided for in a bi- or multilateral treaty. I have therefore every reason to believe that a decision of a United States court in the captioned matter will not be enforceable in Austria.

IV. THE COURT FEES IMPOSED BY THE AUSTRIAN COURT APPLY TO ALL CIVIL LITIGATIONS AND PLAINTIFF WAS GRANTED SIGNIFICANT LEGAL AID BY THE AUSTRIAN COURT

31. Finally, I have been asked to explain Austrian procedural rules to the extent that they speak to the formula employed by the Austrian court to decide the petition of Ms. Altmann and several other claimants for legal aid in connection with their proceedings before the Austrian courts.

A. *Formula for Court Fees*

32. Generally, lawsuits in Austria are commenced by filing a complaint in court and paying the requested court fees. The court fees are calculated according to a standard formula based on the amount in controversy claimed by the plaintiff. The standard formula used to calculate the court fees is 1.2 percent of the amount in controversy plus 13,180 Austrian Schilling. The amount of the required court fees is entirely dependent upon the amount in controversy claimed by the plaintiff. A true and correct copy of the relevant provisions of the Austrian Statute on Court Fees, together with a certified English translation, is attached hereto as Exhibit 9.

Appendix 1

33. In this case, Dr. Stefan Gulner, Ms. Altmann's attorney in Austria, filed a petition for legal aid for Ms. Altmann, as well as for the other family members who participated in that proceeding, George Bentley and Trevor Mantle. A true and correct copy of Dr. Gulner's petition for legal aid, together with a certified English translation, is attached hereto as Exhibit 10. According to the petition for legal aid filed by the plaintiffs, the amount in controversy was 2 billion Austrian Schilling (or approximately $135 million).[1] As such, the amount of court fees that would normally apply under the standard formula is more than 24 million Austrian Schilling (or $1.6 million).

B. *Legal Aid Granted in Austria*

34. The Austrian Code of Civil Procedure (ZPO) provides for legal aid in certain circumstances. A true and correct copy of the relevant legal aid provisions of the ZPO, together with a certified English translation, is attached hereto as Exhibit 11. In most cases, this possibility is used by parties who cannot afford an attorney because the ZPO mandates that parties have legal representation in the higher courts. In such cases the prospective plaintiff may bring his petition for legal aid before the commencement of a suit. As soon as the attorney appointed to represent the legally-aided plaintiff files the complaint, the court serves its legal aid decision on the defendant concurrently with the complaint. See Austrian Code of Civil Procedure, Section 65.

1. The current exchange rate is 14.7 Austrian schillings per U.S. dollar. *See* http://pacific.commerce.ubc.ca/xr/today.html.

Appendix 1

35. Upon Dr. Gulner's petition, Ms. Altmann, Mr. Bentley, and Mr. Mantle were granted significant financial aid. On November 2, 1999, the Provincial Court for Civil Law Matters in Vienna found that, in light of the income and assets at the disposal of the plaintiffs, and the amount in controversy claimed by the plaintiffs of 2 billion Austrian Schilling, plaintiffs' "necessary maintenance"[2] would be impaired by the imposition of court fees under the usual formula. The court accordingly granted legal aid in the amount of more than 19,000,000 Austrian Schilling, requiring Ms. Altmann to pay a reduced court fee of 2 million Schilling (approximately $135,000). See Decision of the Provincial Court for Civil Law Matters dated November 2, 1999, a true and correct copy of which, together with a certified English translation, is attached hereto as Exhibit 12. The judge in Vienna even dispensed with two defects of the petition: the formal requirement that in their case, as the plaintiffs were already represented by an attorney, the petition should have been brought together with the complaint, not just a draft, and the fact that none of the three forms submitted stated to which extent legal aid was asked for. Furthermore, the judge did not require the petitioners to supply documentation supporting the statements made in the forms.

36. According to the application for legal aid and the court's decision, Ms. Altmann's assets alone (not including her West Los Angeles home which was purchased for approximately 900,000 Austrian Schilling or $60,000 at the

2. "Necessary maintenance" is defined by Austrian statute as "the amount of maintenance that the party requires for itself and its family, for which it has to care, in order to maintain a simple living standard." Austrian Code of Civil Procedure § 63(1).

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current exchange rate and was paid in full in 1975)[3] total more than $240,000.

37. Although they had the legal right to do so, Ms. Altmann, Mr. Bentley, and Mr. Mantle did not appeal the legal aid decision. Moreover, they could have applied for an extension of the term of payment of the court fees, claiming that prompt payment would constitute a special hardship.

38. The office of the attorneys for the Republic of Austria, the Finanzprokuratur, is legally bound to file an appeal if it determines that there was an error in the procedure and in the application of the legal aid statutes. In this case, the Finanzprokuratur filed an appeal and argued that plaintiffs' petitions were inaccurate because they failed to declare that plaintiffs had received various art objects worth at least 10 million Austrian Schilling (almost $700,000) prior to the filing of their legal aid petition. The Court of Appeals rejected the Finanzprokuratur's appeal, but only as untimely because the Finanzprokuratur had not yet been served with the complaint. See Decision of the Court of Appeals dated April 14, 2000, a true and correct copy of which, together with a certified English translation, is attached hereto as Exhibit 13.

39. Although each party must advance its own costs and the plaintiff must post the court fees, the Austrian court will determine allocation of costs as part of its judgment. Under the Austrian Code of Civil Procedure, the prevailing

3. Notably, Ms. Altmann did not list the most recent taxable assessment unit value of her home in her application for legal aid.

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party is entitled to both his or her attorney's fees and the court's fees. Attached hereto as Exhibit 14 are the relevant portions of the ZPO, together with a certified English translation. Thus, in the event they prevailed in their action in Austria, Ms. Altmann and the other family members would be entitled to recover all of the court fees and their attorney's fees as part of the final judgment.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February ___, 2001 in Vienna, Austria.

Dr. Walter Friedrich

APPENDIX J — EXHIBIT 1 TO DECLARATION OF DR. WALTER FRIEDRICH DATED FEBRUARY 1, 2000

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Attorney-at-Law (admitted in Austria)
Rudolfsplatz 12/18, A-1010 Vienna, AUSTRIA
Tel: (431) 535 61 15, Fax: (431) 533 58 63-24

Date of Birth: July 20, 1952
Place of Birth: Vienna, Austria
Citizenship: Austrian

Education: 1975: Juris Doctor, University of Vienna, Austria.

Professional Standing:
1978: passed Austrian Judge's Examination
1978: appointment as a judge;
1989: certification passed Austrian Bar Examination.

Positions:
1975 – 1978:
law clerk to various Austrian courts

1978 – 1981:
judge of district courts.

1981 – 1991:
judge, Documentation Centre of the Supreme Court of Austria.

1991 – to date:
private practice, specializing in international business law and estates.

Appendix J

Special Project: 1987 – 1988:
US Library of Congress: research project commissioned by the Austrian Government to study the US Constitution.

Expert Witness On Austrian Law:

– Plasmapharm Sera GmbH & Co KG v. Marvic, Inc., Marvic Interpharma, Inc. and Maria V. Cancino, United States District Court, Middle District of Florida, Tampa Division, Case No. 86-1377-CIV-T-21C.

– Besicorp Group, Inc. v. Solkav Solartechnik GmbH, American Arbitration Association, New York, NY, 13 T 133 00772/91

– Rashi Textiles U.S.A., Inc. v. Rhomberg Textil GmbH, 857 F.Supp. 1051 (S.D.N.Y. 1994)

– Ing. Hoschek Autoverleih GmbH v. Balag, Ltd., Sasha Muniak, Car-Pol Leasing Ltd., 16 East 48th Street Corp. and Services Mangia, Inc., Supreme Court of the State of New York, County of New York, Index No. 95/100381

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– United States of America v. Portrait of Wally, a Painting by Egon Schiele, United States District Court, Southern District of New York, 99 Civ. 9940 (MBM)

Admission: United States District Court, Southern District of New York, Pro Hac Vice: Vossen Frottier GmbH v. Milos Marketing, Inc. et al., 93 Civ. 2823 (RSW)

APPENDIX K — DECLARATION OF DR. STEFAN GULNER DATED FEBRUARY 20, 2001

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Attorney for Plaintiff
MARIA V. ALTMANN

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 00-08913 FMC AIJx
[The Honorable Florence-Marie Cooper]

MARIA V. ALTMANN, an individual,

Plaintiff,

v.

REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY, an agency of the REPUBLIC OF AUSTRIA,

Defendants.

Appendix K

DECLARATION OF DR. STEFAN GULNER IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)

[Filed concurrently with Memorandum of Points and Authorities and Declaration of E. Randol Schoenberg]

Hon. Florence-Marie Cooper
Crtrm. 750 Roybal Bldg
Date: March 19, 2001
Time: 10:00 a.m.

I, Dr. Stefan Gulner, attorney at law, Lugeck 7, Vienna A-1010 Austria, declare as follows:

1. Since 1988 I am an attorney in Vienna, Austria. I obtained my doctoral degree in 1983 from the University of Law of Vienna.

2. Since August, 1999 I have represented the plaintiff Maria Altmann, who authorized me to represent her in her efforts to obtain restitution of six paintings by Gustav Klimt that are the subject of the present action.

3. I have personal knowledge of the facts set forth herein and if called upon to testify I could testify competently to these facts.

4. In October, 1999 I took the initial legal steps in Austria to prosecute Mrs. Altmann's legal right to restitution of the six Klimt paintings.

Appendix K

5. Regarding the expense of court costs that must be deposited at the beginning of a legal process in Austria, allow me to state the following: I agree with Dr. Walter Friedrich, that in Austria the court costs must be deposited upon the filing of the complaint. The amount of the court costs is based on the amount of the given value in dispute (Streitwert).

6. In the case of a complaint for restitution of property, in this case the Klimt paintings, it is allowed in Austria to declare a value in dispute that is independent of the value of the property. If the defendant does not object to the amount of the declared value in dispute, the given value in dispute in the complaint is binding and court costs are measured from that value. However, if the defendant objects, the Court may raise the value in dispute and adjust the court costs accordingly.

7. For the proceeding in the court of first instance, the amount of the court costs to be deposited is 1.2% of the value in dispute, for the proceeding in the second instance 1.8%, and for the proceeding before the Supreme Court 2.4%.

8. The paintings in dispute have an estimated value of $150 million. In the event the complaint would use this as the value in dispute, or if the value in dispute were raised to this amount on the basis of an objection by the defendant (Republic of Austria), it would not be possible for Mrs. Altmann to pay the required amount in court costs from her own property. Indeed, even the payment of a much smaller amount would be beyond her means and would endanger her economic existence.

9. For this reason I filed an application to obtain litigation assistance (Verfahrenshilfe) in the County Court for Civil Law (Landesgericht für Zivilrechtssachen), attaching the complaint and an asset declaration of Mrs. Altmann, copies of which are attached to Dr. Friedrich's declaration as Exhibits 7 and 10, respectively.

10. In her application for litigation assistance, Mrs. Altmann set forth all of her assets and property. Mainly this was made up of her house, some savings worth several thousand dollars, and two certificates of deposit that totaled $200,000 in value, at this time worth approximately 2 million Austrian Schilling at the prevailing exchange rate of 10:1.

11. Because of difficulties caused by the Austrian bureaucracy, at the time of her application Mrs. Altmann had not yet received several drawings and porcelain settings that had been promised to her already months earlier, so that these items could not be included in Mrs. Altmann's asset declaration.

12. With the decision of the County Court for Civil Law on November 2, 1999, Mrs. Altmann's application for litigation assistance was approved. However, the Court stated that Mrs. Altmann would have to deposit 2 million Schilling in court costs (at the time equal to $200,000). The rest of the amount would be preliminarily waived. The Court held that Mrs. Altmann's savings could not be spared at the expense of her obligation to pay court costs.

13. With the application for litigation assistance the Court was required to examine the likelihood of success of

the accompanying complaint, and it was determined that in any case the complaint could not at the outset be qualified as frivolous or obviously meritless.

14. Against my expectations the Republic of Austria filed an appeal on December 13, 1999 against the decision of the court, and in this appeal stated that the recently restituted porcelain and drawings had to be considered with regard to the amount of the court costs required from Mrs. Altmann. In addition, the Republic of Austria argued that a claim could be made as a matter of principle to her other property (capital property, real estate).

15. The Attorney General further argued in its appeal that Mrs. Altmann should not receive any litigation assistance, because absent reciprocity with the United States it would be impermissible. The Attorney General, as representative of the Republic of Austria, for this reason also requested that any litigation assistance, i.e. the partial waiver of court costs, should be completely refused.

16. With the appeal of the litigation assistance ruling pending, and facing already an impossible 2 million Schilling payment in order to institute her lawsuit, Mrs. Altmann and I agreed that I would try to obtain a stipulation from the Austrian Attorney General (Finanzprokuratur) that would set the value in dispute at 660,000 Schilling. This amount would lead to costs that were bearable for Mrs. Altmann and in any case would be required as minimum amounts necessary for litigation in the high courts in Austria.

17. In Austria, the statute of limitations is no more than 30 years. For this reason, different legal claims that would be available to Mrs. Altmann (e.g. challenging a testament on the grounds of mistake, restitution of looted property, etc.) are no longer possible in Austria. Without an agreement to waive the statute of limitations, it is very unlikely that any such claims could be made successfully in an Austrian court. Therefore, in order to proceed in Austria it was necessary to obtain a waiver of the statute of limitations.

18. Because the federal minister for education and culture who is responsible for this matter, Elisabeth Geher, wrote to my colleague E. Randol Schoenberg on July 12, 1999 that his client should seek her remedy in court, I was under the impression that the Republic of Austria wanted in any case a clarification from an Austrian court of the disputed legal issues in this case. I was therefore confident that the Republic of Austria would not play out its economic might against Mrs. Altmann and would waive any statute of limitations defense.

19. Therefore, independent of the appeal of the decision on litigation assistance, on February 18, 2000 I wrote to the Republic of Austria and sought an agreement to set the value in dispute at 660,000 Schilling and to waive application of the statute of limitations.

20. Despite my repeated requests, this letter has remained to this day unanswered by the Attorney General, as representative of the Republic of Austria. Minister Gehrer, to whom I also sent a copy of my letter, answered simply in a letter from March 31, 2000 that she could not give

instructions to the Attorney General. This response by Minister Gehrer is incorrect, because naturally the Attorney General as lawyer of the state, is bound – like any attorney — by the instructions of his client, in this case Minister Gehrer, as representative of the Republic of Austria.

21. On April 14, 2000 the Appellate Court in Vienna, in the second instance, rejected the appeal of the award of litigation assistance as invalid. According to the holding of the Appellate Court, service of a ruling on litigation assistance on the opponent (Repubic of Austria) is invalid, as long as the complaint has not been brought. In this way it should be prevented that the defendant obtains knowledge of the complaint already before it has been filed. For this reason the Appellate Court in Vienna did not address the grounds for appeal raised by the Republic of Austria.

22. Had the Republic of Austria's argument on appeal been considered, Mrs. Altmann also would most likely at the very least have been required to sell the porcelain and drawings she finally received after applying for litigation assistance, and deposit the proceeds as court costs. Had the Republic of Austria's arguments been completely successful, Mrs. Altmann would have been denied all litigation assistance. Based on a value in dispute of $150 million, the court costs for the court in the first instance would total 24 million Schilling, far more than Mrs. Altmann's total assets even including the value of the drawings and porcelain she received.

23. Further, in the event Mrs. Altmann were to lose her case, there was also the danger that the Republic of Austria,

Appendix K

independent of the approval of litigation assistance, could seek to recover all of its litigation expenses, including attorney's fees. This also posed a danger that Mrs. Altmann would be reduced by an adverse judgment to a minimum level of existence.

24. Because a woman of the age of 84 (now 85) should not take the risk of losing her house and all her assets and income, under these circumstances I could not advise Mrs. Altmann to file her complaint in Austria.

25. There are different formal grounds (procedural and jurisdictional) that the Republic of Austria could try to use against the complaint if it were filed in Austria. Among others the Republic of Austria could claim that under the 1998 Restitution law there is no possibility of filing a complaint against the Republic of Austria. However, in my opinion, the proceedings that transpired to date before the advisory board (Beirat) did not entail a "fair trial" because the parties are not allowed to participate. Therefore, Minister Gehrer was not required to accept the recommendation of the advisory board as a basis for her decision not to return the Klimt paintings.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed by me in Vienna, Austria on February __, 2001.

_____

Dr. Stefan Gulner

APPENDIX L — EXHIBIT G TO THE DECLARATION OF E. RANDOL SCHOENBERG IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)

January 17, 2001

Stuart E. Eizenstat
Deputy Secretary of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, DC 20220

Dear Deputy Secretary Eizenstat,

This is to confirm that the Exchange of Notes concerning the establishment of the General Settlement Fund, the Joint Statement of January 17, 2001, and any provisions concerning "legal closure" therein, shall not affect or pertain to the matter of *Maria Altman[n] v. Republic of Austria et al.*, currently pending before the United States District Court for the Southern [sic] District of California, because it is a matter of art restitution under the Austrian law. The United States Government has indicated to the Austrian Federal Government that it will not file a Statement of Interest in the above matter.

Sincerely,

Hans Winkler
Legal Adviser
Austrian Federal Ministry for Foreign Affairs

APPENDIX M — SUPPLEMENTAL DECLARATION OF DR. WALTER FRIEDRICH DATED MARCH 9, 2001

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Attorneys for Defendants REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 00-08913 FMC (AIJx)
[The Honorable Florence-Marie Cooper]

MARIA V. ALTMANN, an individual

Plaintiff,

v.

REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY, an agency of the REPUBLIC OF AUSTRIA,

Defendants.

Appendix M

SUPPLEMENTAL DECLARATION OF DR. WALTER FRIEDRICH IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

DATE: March 19, 2001
TIME: 10:00 a.m.
CTRM: 750, Roybal Federal Building
255 E. Temple Street
Los Angeles, CA 90012

Complaint Filed: August 22, 2000

SUPPLEMENTAL DECLARATION OF DR. WALTER FRIEDRICH

I, Dr. Walter Friedrich, declare as follows:

1. I make this Declaration at the request of the attorneys for defendants the Republic of Austria, a foreign state, and the Austrian Gallery (collectively, "Defendants") in support of Defendant's Reply Memorandum of Points and Authorities in Support of Motion to Dismiss Under Fed. R. Civ. P. 12(b). I make this Declaration based upon my own personal knowledge and research.

2. A 30-year statute of limitations generally applies to civil claims in Austria. General Civil Code of Austria (ABGB) sections 1478-1479. Under Austrian law, acts of fraudulent concealment within that period toll the 30-year statute of limitations.

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3. The 30-year statute of limitations, which bars causes of action based on events that occurred more than 30 years ago, does not prevent Plaintiff from basing her claims on the 1998 Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections. As I stated in my Declaration filed in support of Defendants' Motion, that legislation authorizes the Minister of Finance to return artworks in special instances enumerated in the Statute where claims could otherwise not be made because, for example, the applicable statute of limitations would bar those claims.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and was executed this ____ day of March, 2001 at Vienna, Austria.

_____

Dr. Walter Friedrich

Supreme Court, U.S.
FILED
NOV 14 2003
OFFICE OF THE CLERK

No. 03-13

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the expropriation exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3), affords jurisdiction over claims against foreign states based on conduct that occurred before enactment of the FSIA and, indeed, before the United States adopted the restrictive theory of sovereign immunity in 1952.

LIST OF PARTIES

The parties below are listed in the caption. In addition, the United States of America appeared as *amicus curiae* in support of petitioners during proceedings before the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

The Republic of Austria is a sovereign state.

The Austrian Gallery is a national museum of the Republic of Austria. In 2000, it was re-organized under Austria's Statute on Federal Museums, BGBl [Federal Law Gazette] I Nr. 115/1998, as a public-law scientific institution of the Federal Republic. The Austrian Gallery is "entrusted with immovable and movable monuments in the possession of the Federal Republic in order to fulfill its cultural-policy and scientific tasks as a non-profit and public institution." *Id.*, at § 2(1). As such, the Gallery has no parent company, issues no stock, and no publicly held company has any ownership in it.

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OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Ninth Circuit is reported at *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002). The opinion was amended on April 28, 2003, 327 F.3d 1246 (9th Cir. 2003). The Ninth Circuit affirmed the May 7, 2001 decision of the United States District Court for the Central District of California, as amended on May 11, 2001, reported at 142 F. Supp. 2d 1187 (C.D. Ca. 2001). *See* J. App. C-F.[1]

STATEMENT OF JURISDICTION

The Ninth Circuit's opinion was entered on December 12, 2002. Petitioners' timely petition for panel rehearing with suggestion for rehearing *en banc* was denied on April 28, 2003. *See* J. App. F.

The petition for writ of certiorari was filed on June 27, 2003, and was granted on September 30, 2003 (limited to question one presented by the petition). This Court has jurisdiction under 28 U.S.C. § 1254(1).

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1. "J. App." refers to citations to the Joint Appendix. "Br. App." refers to citations to the Appendix to this brief. Sup. Ct. Rule 24(g).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 United States Code, Section 1602:

Findings and declaration of purpose.

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

Title 28 United States Code, Section 1604:

Immunity of a foreign state from jurisdiction.

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Title 28 United States Code, Section 1605(a)(3):

General exceptions to the jurisdictional immunity of a foreign state.

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case – * * *
>
> > (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

Public Law 94-583, Section 8:

> This [Foreign Sovereign Immunities] Act shall take effect ninety days after the date of its enactment [October 21, 1976].

The provisions of 28 U.S.C. §§ 1603, 1605, 1607 and 1610 are lengthy and, therefore, set out in Appendix E to this Brief, pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

In affirming the district court's assertion of jurisdiction over the Republic of Austria and its national museum, the Ninth Circuit became the first circuit court of appeals to hold that a foreign state is subject to United States jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1602 *et seq.*, for conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952 and, in particular, to an alleged expropriation of property that occurred over twenty-five years before the FSIA's enactment. J. App. 37a.

A. The Foreign Sovereign Immunities Act

Enacted by Congress in 1976, the FSIA provides "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and . . . when a foreign state is entitled to sovereign immunity." Senate Rep. No. 94-1310, 94th Cong., 2d Session (1976) ("S. Rep."), at 8. The Act prescribes comprehensive rules governing the assertion of personal and subject matter jurisdiction over foreign states in United States district courts; establishes the procedures for effecting service of process on foreign states and their agencies or instrumentalities; and details the means by which to satisfy judgments against foreign states in the United States. S. Rep. at 12.

The FSIA also defines the substantive law of foreign sovereign immunity in the United States. The statute confirms that foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States," and establishes exceptions to that immunity. 28 U.S.C. § 1604. Many, but not all, of the exceptions to sovereign immunity

enacted in 1976 were intended by Congress as a codification of the tenets of a "restrictive theory" of sovereign immunity first adopted by the State Department in 1952 in what is known as the Tate Letter. 28 U.S.C. § 1605; S. Rep. at 12.

The expropriation exception, 28 U.S.C. § 1605(a)(3), created United States jurisdiction over foreign states where none existed before 1976. Prior to the FSIA's enactment, the expropriation of property by a foreign state within its borders had always been considered, even under the restrictive theory, to be a public act for which sovereign states were absolutely immune, unless the foreign state voluntarily submitted to United States jurisdiction.

The original 1976 provisions – including the expropriation exception – contain no statement that they be applied retrospectively to pre-enactment events.

B. Altmann's Expropriation Claims

The dispute in this case concerns six paintings by Gustav Klimt that are and have always been located in Austria. The paintings are owned by the Republic of Austria. They have been housed in Austria's national gallery for the past fifty-five years in furtherance of its mandate to preserve art of national significance entrusted to it by the Republic. Austria's ownership of the paintings derives from events that occurred before and after World War II, independent of Nazi atrocities. Maria Altmann claims that the paintings were expropriated by the post-war Republic of Austria in 1948.

The events giving rise to Altmann's expropriations claims, and Austria's claim of ownership, began in 1925, upon the probate of her aunt's 1923 will in Austria.

Mrs. Altmann's aunt, Adele Bloch-Bauer, provided in her will that six paintings by Gustav Klimt, which had hung in the Bloch-Bauer palais in Vienna until the time of her death, should be given to the Austrian Gallery upon her husband's death. During the probate of Adele's will, questions were raised regarding the enforceability of the bequest (involving, among others, whether the paintings were her property or her husband's, and whether she made a bequest or requested that her husband do so). Nonetheless, Adele's husband, Ferdinand Bloch-Bauer, formally assured the Austrian probate court that he would honor his wife's gift. Notice of that assurance was given to the Austrian Gallery. Consistent with his assurances, Ferdinand delivered one of the paintings to the Gallery in 1936. Two years later, in 1938, Nazi Germany invaded, occupied and claimed to annex Austria, in what became known as the *Anschluss*. J. App. 161a-162a at ¶¶ 16-20.

The Nazis looted Ferdinand's Viennese residence, his business and other holdings in 1939, including the five paintings remaining there, and a sixth, entitled *Amalie Zuckerkandl*. Two years later, one Nazi official delivered two of the paintings to the Gallery and removed the one painting Ferdinand had delivered in 1936. That same Nazi official delivered a third painting to the Gallery in 1943. The remaining paintings were sold to a director of Nazi propaganda films, the Museum of the City of Vienna and a private art dealer. J. App. 164a at ¶¶ 25-26.

After the war, Ferdinand, who had fled to Switzerland shortly before the *Anschluss*, retained a prominent Austrian attorney (and long-time family friend), Dr. Gustav Rinesch, and instructed him to locate and retrieve family property stolen by the Nazis. Ferdinand died in 1945, leaving the

residue of his estate to two of his nieces (Altmann and her sister Luise) and a nephew, Altmann's brother Robert. (Ferdinand and Adele had no children.) The three heirs retained Dr. Rinesch as their attorney after their uncle's death. J. App. 169a at ¶¶ 35-36.

Irrespective of the Nazis' intervening acts, after reviewing Adele's will and the probate file pertaining to it, Dr. Rinesch in 1948 concluded that the will, together with Ferdinand's assurances to the probate court in 1925 and his delivery of the first painting to the Gallery in 1936, conferred ownership of the Klimt paintings to Austria, and reported his conclusions to the family. On April 12, 1948, Dr. Rinesch signed a written acknowledgment on behalf of Altmann and her co-heirs, confirming Austria's entitlement to the paintings. Thereafter, Dr. Rinesch and another one of Altmann's brothers, Karl, who was a United States Army Captain stationed in Vienna, assisted Austrian officials in locating and retrieving the remaining paintings that had been stolen by the Nazis, and delivering them to the Gallery. J. App. 169a, 174a-175a, 177a at ¶¶ 37, 50, 52, 53, 58.[2]

Other than retaining Dr. Rinesch with her co-heirs in 1945, Altmann took no part in her family's post-war activities in Austria, having lived in the United States since about 1938. Altmann now asserts – after the deaths of Robert, Luise, Karl and Dr. Rinesch – that the paintings were expropriated by the Republic in 1948, by conditioning the grant of export permits for other family property on the family's

2. Following World War II, the Republic restituted to Altmann and her siblings a number of other valuable works of art and other family property seized by the Nazis which, unlike the Klimt paintings, were not bequeathed to Austria before the war by Altmann's aunt. J. App. 180a at ¶ 65.

acknowledgment that the paintings already belonged to Austria by virtue of Adele's will and Ferdinand's acknowledgment. J. App. 175a, 178a, 180a at ¶¶ 51, 60, 65.[3]

Altmann allegedly discovered her claims in 1999 after an Austrian reporter gave copies of government documents to her attorney concerning the disposition of the paintings in 1948. Altmann first brought her claims to an Advisory Board commission ("Advisory Board") empowered by Austrian statute to consider art restitution claims of Holocaust survivors and other Nazi victims. Altmann's claim to the paintings was rejected in 1999 by the Advisory Board, after its review of the facts and applicable law. J. App. 182a, 185a, 188a-190a at ¶¶ 70, 76, 87-89.[4]

3. Altmann concedes, however, that *Amalie Zuckerkandl* was not expropriated by the Republic in 1948, but donated to the Gallery by a third party in 1988. Altmann offers no argument to support the exercise of jurisdiction with regard to the *Zuckerkandl* painting. J. App. 165a, 196a, 198a at ¶¶ 26(f), 109, 120.

4. On the Board's recommendation, Austria in 1999 restituted approximately one million dollars worth of porcelain to Altmann and her family that was *not* mentioned in Adele's will or the family's 1948 acknowledgment. J. App. 185a at ¶ 76. The Advisory Board is appointed under the Austrian Federal Statute on the Restitution of Art Objects from the Austrian Federal Museums and Collections (the "Act"), enacted in 1998. The Act was enacted by the Republic in response to allegations that Austrian officials after World War II wrongfully obtained works of art from Holocaust survivors and other victims of Nazi Germany. Based on the Advisory Board's recommendations, as of 2002 the Republic had returned over 2,000 valuable works of art to Holocaust survivors and other victims of the Nazi regime – including to Altmann and her family. J. App. 180a at ¶¶ 66, 67, 69, 71; Stuart E. Eizenstat, Imperfect Justice, Looted Assets, Slave Labor, and the Unfinished Business of World War II 200 (Public Affairs 2003).

Altmann and only two other descendants of her co-heirs initiated litigation in Austria challenging the Advisory Board's decision. They later abandoned that action and Altmann, alone, brought this action in the United States seeking an order compelling Austria to relinquish the paintings to her. J. App. 189a, 194a at ¶¶ 89, 97.

Altmann has maintained exclusively below that jurisdiction is based on the FSIA's expropriation exception to foreign sovereign immunity, 28 U.S.C. § 1605(a)(3). J. App. 44a, 84a.

C. The District Court Proceedings

Petitioners brought their motion to dismiss under Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction, Rule 12(b)(6), for failure to state a claim, Rule 12(b)(3), for lack of venue, Rule 12(b)(7), for failure to join indispensable parties, and under the doctrine of *forum non conveniens*. J. App. 72a.

With regard to the question before this Court, the district court held that the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), eliminates Austria's sovereign immunity to Altmann's claims, notwithstanding that they arose in 1948. The lower court reasoned that the FSIA is merely a jurisdictional statute and, thus, not subject to the presumption against retroactivity enunciated by this Court in *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994). J. App. 90a. Based on this ruling, the district court denied the motion in its entirety, holding that, because the *Austrian Gallery* is purportedly engaged in commercial activity in the United States under section 1605(a)(3), *the Republic* and its national museum are not entitled to sovereign immunity, even though the paintings are not, and never have been, housed in the United States. J. App. 102a-103a.

D. The Court of Appeals' Decision

A panel of the Ninth Circuit affirmed, but held that the FSIA may be applied retrospectively on different grounds. J. App. 46a. The Ninth Circuit assumed without deciding that Congress did not expressly provide that the FSIA may be applied retrospectively. J. App. 49a. The court nevertheless found that retrospective application of the FSIA to 1948 events would not have an impermissible retroactive effect on Austria for four reasons:

1. Austria could not expect immunity in 1948 because seizures of art violated Austria's and Germany's purported obligations under the 1907 Hague Convention (IV) on the Laws and Customs of War on Land. J. App. 50a.

2. The State Department would have recommended against sovereign immunity had this case been brought in 1948 because Austria purportedly was not a friendly nation during World War II. J. App. 49a; 51a-53a.

3. According to the Ninth Circuit, foreign states had no expectation of absolute immunity in the United States in 1948 if, in their own courts, they applied a restrictive theory of sovereign immunity to other countries. J. App. 54a.

4. Foreign states such as Austria assertedly had *less* expectation of sovereign immunity in 1948 for expropriations of property within their own borders than for "economic transactions" such as breach of contract. J. App. 55a.

SUMMARY OF ARGUMENT

1. In 1948, foreign states were absolutely immune from United States jurisdiction for expropriations of property within their own borders, even if the expropriations were in violation of international law. The FSIA does not apply retrospectively to eliminate that immunity. Accordingly, this case should be dismissed.

The FSIA's expropriation exception, embodied in section 1605(a)(3), significantly changed the law of sovereign immunity as it existed before enactment of the statute in 1976. Before the FSIA was enacted, United States courts and the Executive Branch adhered to the absolute rule of foreign sovereign immunity for expropriations of property by foreign states within their own borders, even if the expropriations were in violation of international law. The expropriation exception, however, removed immunity and conferred subject matter jurisdiction for certain expropriations undertaken "in violation of international law." 28 U.S.C. § 1605(a)(3).

Nothing less than the clearest legislative mandate is required to change the longstanding rules affecting the United States' relations with sovereign states. Because the FSIA lacks any clear statement that it applies to pre-enactment expropriations, and Congress plainly intended section 1605(a)(3) to regulate and remedy expropriations by foreign states in violation of international law, the statute applies only to expropriations on or after its effective date.

If applied retrospectively, the FSIA's expropriation exception plainly would attach new legal consequences in the United States to foreign states for expropriations within their borders that did not exist before the FSIA was enacted.

Retrospective application of the statute would increase – indeed, create – liability of foreign states for past expropriations, and impose new duties on foreign states with respect to their actions that occurred when foreign states were absolutely immune from suit in this country.

2. The Ninth Circuit nonetheless premised its decision on its conclusion that Austria, in particular, would have had no expectation of sovereign immunity for an expropriation of property in 1948. The Ninth Circuit's historical conclusion was in error, and its holding disregarded precedent and rested on four exceptions to sovereign immunity never before recognized in the United States. First, the Ninth Circuit held that Austria could not expect immunity because seizures of art violated the Hague Convention of 1907, to which Austria was a signatory. However, those provisions of the Hague Convention apply exclusively to the duties of *occupying* states over the territories of other states that they occupy, and therefore have no application here. The Ninth Circuit's position also is irreconcilable with this Court's prior holding in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989), that international conventions do not create private rights of action against foreign states in United States courts unless, by their express terms, the foreign state has agreed to United States jurisdiction.

The Ninth Circuit's second holding, that Austria had no expectation of sovereign immunity because it was not friendly to the United States during World War II, is legally and historically wrong. As confirmed by the United States in its *amicus curiae* brief below, *all* foreign states at that time were entitled to absolute immunity, whether friendly, or not, to the United States. Moreover, Austria was not a belligerent nation during the war; rather, the Allied Powers declared

Austria to be the first friendly foreign state that was occupied by Nazi Germany. The Ninth Circuit's holding also disregards the fact that the expropriation at issue was purportedly undertaken in 1948, after Austria was liberated and its newly elected democratic government had been recognized by the United States.

The Ninth Circuit also held that Austria had no expectation of sovereign immunity in 1948 because it had adopted a restrictive theory of sovereign immunity in its own courts. However, expropriations by foreign states of property located within their own borders were indisputably treated as public acts (*jure imperii*), for which all foreign states were considered immune, even under the restrictive theory. The Ninth Circuit's fourth holding, that Austria had less expectation of immunity in 1948 for an expropriation of property within its borders than for commercial conduct, is wholly contrary to this Court's rulings and State Department policy before 1952 (and after).

More fundamentally, the Ninth Circuit's analysis depends primarily on speculation over what the Executive Branch might have recommended to United States courts fifty-five years ago and what weight those courts would have given to that recommendation. The temporal reach of the FSIA should apply uniformly to all foreign states. Whether the expropriation exception applies to pre-enactment events requires a categorical answer, not one that, as presumed by the Ninth Circuit, changes from country to country, depending on a federal court's reading of the historical record.

3. The lower court's country-specific analysis creates an unmanageable judicial regime. If upheld, the Ninth Circuit's approach would burden the lower courts with the

fruitless task of speculating about what the Executive Branch and our courts might have done decades and, perhaps, even centuries ago – when the historical record already should be clear that *all* foreign states were afforded absolute immunity for expropriations before 1976, and for all conduct before 1952. Conflicting findings about particular foreign states in the various lower federal courts will result from this approach, and create confusion and uncertainty among the courts, as well as plaintiffs and foreign states, where none had existed before. Moreover, the approach adopted by the Ninth Circuit conflicts with the plain intent of Congress in enacting the FSIA to depoliticize the law of sovereign immunity and, instead, would invite each lower court to apply its own subjective historical view to each case.

Retrospective application of the FSIA's expropriation exception will adversely affect this country's relations with other foreign states. Had Congress intended that United States courts sit in judgment on the conduct of foreign states for the indefinite past, it would have and, indeed, should have, clearly stated so. In the absence of such a statement, the courts are discouraged by long-standing judicial doctrines from engaging in foreign policy determinations that have always been reserved to the Executive Branch.

ARGUMENT

I. THE EXPROPRIATION EXCEPTION TO THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 DOES NOT SUBJECT FOREIGN STATES TO JURISDICTION FOR CLAIMS BASED ON CONDUCT THAT OCCURRED IN 1948.

The Ninth Circuit's holding that the FSIA's expropriation exception may reach back over fifty-five years (and beyond) runs counter to the essential presumption that "[a] foreign state is normally immune from the jurisdiction of federal and state courts." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The decision below also is irreconcilable with this Court's holdings in *Landgraf* and the considerations of fairness and common sense that this Court has deemed essential to proper statutory construction.

A. Foreign States Were Immune From United States Jurisdiction Over Claims For Expropriation Of Property Within Their Borders Before The FSIA Was Enacted.

1. The sovereign immunity of foreign states has been recognized in the United States since Chief Justice Marshall's opinion for the Court in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), where the Court for the first time articulated the principle of foreign sovereign immunity in this country and its importance to the United States' relationships with other nations. Though foreign sovereign immunity is not mentioned in the Constitution, Chief Justice Marshall reasoned that the immunity of foreign states was "reserved by implication" in the accepted practice of nations to respect each other's sovereignty and territorial integrity. *Id.* at 137.

During the first 140 years after *The Schooner Exchange*, the United States comprehensively recognized the absolute immunity of foreign states in *in rem* maritime actions, e.g., *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926); *Ex Parte Republic of Peru*, 318 U.S. 578, 587 (1943), and in *in personam* actions, *e.g.*, *Sullivan v. State of Sao Paolo*, 122 F.2d 355, 359 (2d Cir. 1941); *Puente v. Spanish National State*, 116 F.2d 43, 45 (2d Cir. 1940), *cert. denied*, 314 U.S. 627 (1941). *See also Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 374-376 (1923) (suit against Russia for expropriation of fur).

In 1926, this Court affirmed in *Berizzi Bros.* that foreign states were entitled to absolute sovereign immunity as a matter of law, even for so-called commercial activities and even if the State Department did not recommend in favor of immunity. *Berizzi*, 271 U.S. at 612. In such cases before 1952, the claim of immunity turned on only two questions: first, whether the claim was asserted by a competent representative of the foreign state, *e.g.*, *The Anne*, 16 U.S. (3 Wheat.) 435, 445 (1818); *The Guj Djemal* 264 U.S. 90 (1924); and second, whether the ship was in the service of the foreign state at the time it was seized in United States territory. *E.g.*, *Berizzi Bros.*; *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938).

By the middle of the 1940s, while maintaining its adherence to the doctrine of absolute immunity, this Court recognized the need for greater deference to the Executive Branch in sovereign immunity cases. *Ex Parte Republic of Peru*, 318 U.S. at 587 ("courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations"); *Republic of*

Mexico v. Hoffman, 324 U.S. 30, 35 (1945) ("[i]t was not for the courts to deny immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize"). *See also* Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Col. J. Transnat'l L. 33, 41 (1978).

2. In 1952, the State Department formally announced that it would depart from its prior policy of absolute immunity and begin restricting its recognition of foreign sovereign immunity in cases involving commercial activity. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976). The State Department's decision was announced in a letter from Jack B. Tate, Acting Legal Advisor to the State Department, to Acting Attorney General Philip Perlman. *Id.* at 711. Br. App. 1a. The Tate Letter confirmed that, until 1952, "[t]he classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States." Br. App. 2a. The State Department advised that, henceforth, foreign sovereign immunity generally would continue to be recognized with regard to a foreign state's public acts (*jure imperii*), as before, but not with respect to its commercial, or private, acts (*jure gestionis*). Br. App. 5a.

Although no clear set of guidelines implementing the commercial activity exception to foreign sovereign immunity under the restrictive theory emerged from the State Department or the courts from 1952 to 1976, *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); *see also* William W. Bishop, Jr., *New United States Policy Limiting Sovereign Immunity*, 47 Am. J. Int'l L. 93, 103 (1953), one basic principle was beyond dispute: neither the State Department nor the courts ever applied it to expropriations by foreign

states of property located within their borders, which were uniformly treated as *jure imperii*. John A. Boyd, Digest of United States Practice in International Law, *Sovereign Immunity Decisions of the Department of State May 1952-January 1977*, Appendix 1018, 1020 (Michael Sandler, Detlev F. Vagts and Bruno A. Ristau eds.) (1977) ("under the Tate Letter, the Department took the position that an expropriation was a public act as to which immunity should be accorded") (citations omitted). *See also Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 394 (1965) (recognizing that foreign sovereigns enjoyed immunity, even under the restrictive theory, for "strictly political or public acts . . . such as nationalization").[5]

3. The public nature of foreign expropriations was reinforced in another line of cases concerning primarily the act of state doctrine, emanating from this Court's decision in *Underhill v. Hernandez*, 168 U.S. 250 (1897), which held that United States courts "will not sit in judgment on the acts of the government of another done within its own territory." *Id.* at 252. For example, the Court refused in several cases to question expropriations of private property by the revolutionary provisional government of Mexico in the early twentieth century. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918) (two cases) ("[t]he principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency"); *Ricaud v. American*

5. *Cf. National City Bank of New York v. Republic of China*, 348 U.S. 356, 364 (1955) (immunity denied only because foreign state *voluntarily* submitted to United States jurisdiction by initiating litigation and thereby placing in issue the legality of the expropriation); 28 U.S.C. § 1607.

Metal Co., 246 U.S. 304, 314 (1918) ("when it is made to appear that the foreign government has acted in a given way on the subject matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts").

As Justice Cardozo wrote for the Court in *Shapleigh v. Mier*, 299 U.S. 468, 471 (1937), for expropriations by foreign states of property belonging to American citizens, even if done in violation of international law, "the remedy to be followed is along the channels of diplomacy."

These principles were reinforced by this Court in 1964, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), when it declined to question the validity of Cuba's expropriation of sugar from an American corporation in post-revolution Cuba, despite the fact that Cuba voluntarily sought relief in United States courts in a related matter. Because Cuba was the plaintiff in that action, foreign sovereign immunity was not directly at issue. Nevertheless, in declining to question the validity of the expropriation – even when Cuba submitted to the jurisdiction of the United States – this Court held:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, *even if the complaint alleges that the taking violates customary international law*.

Id. at 428 (emphasis added). Notwithstanding the United States' hostile relationship with Castro's Cuba at the time,

the *Sabbatino* Court further observed that "[i]t is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Id.* at 430.[6]

Though these cases do not bear directly on the issue of sovereign immunity, they are strong evidence of this Court's consistent view of acts of expropriation as *jure imperii*.

6. Congress in 1964 enacted legislation limiting the effect of *Sabbatino*. 22 U.S.C. § 2370(e)(2) (the "Hickenlooper Amendment"). For expropriations that took place after January 1, 1959, *but not before*, the Hickenlooper Amendment prohibited United States courts from declining to pass on the validity of expropriations by foreign states in violation of international law under the act of state doctrine, unless the President determined that the doctrine was required in a particular case. *Id.* The Hickenlooper Amendment did not, however, affect the sovereign immunity of foreign states for expropriations of property within their borders. *American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966) ("the [Hickenlooper] Amendment does not bear on the threshold question of whether this Court's jurisdiction over Indonesia would be defeated by its right to sovereign immunity for acts *jure imperii*"). Congress did not alter foreign states' absolute immunity for these acts until its enactment of the expropriation exception to the FSIA in 1976. And, in sharp contrast to the Hickenlooper Amendment's clear statement that it be applied retrospectively to 1959, the FSIA's expropriation exception contains no provision for any retrospective application to pre-enactment expropriations.

B. Congress Enacted A New Substantive Law Of Foreign Sovereign Immunity When It Passed The Foreign Sovereign Immunities Act of 1976.

Congress' intent to codify in the FSIA a *substantive* law of sovereign immunity to some extent consistent with the State Department's restrictive theory was recognized by this Court in *Verlinden*, its first comprehensive consideration of the FSIA. The Court squarely rejected the circuit court's conclusion that actions under the FSIA do not "arise under" federal law because the FSIA is merely a jurisdictional statute, holding as follows:

> The Act . . . does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity *as an aspect of substantive federal law.*

Verlinden, 461 U.S. at 496-497 (emphasis added). *See also Ex Parte Republic of Peru*, 318 U.S. at 588 (foreign state's sovereign immunity is an aspect of substantive law, and not only a matter of jurisdiction).[7]

By its terms, the FSIA defines the parameters of foreign sovereign immunity "henceforth" from the date of its enactment. 28 U.S.C. § 1602. Also, the FSIA included some

7. Presumably, the clarity of the Supreme Court's holding caused the Ninth Circuit to disregard the district court's sole basis for finding that retrospective application of the FSIA was appropriate, namely that it was merely a jurisdictional statute and therefore not subject to the presumption against retroactivity. J. App. 90a-91a.

exceptions to sovereign immunity that had not been adopted by the State Department or the courts prior to its 1976 enactment. The Act further provides substantive definitions of what constitutes a foreign state and commercial activity in the United States, which the State Department had not supplied before 1976. 28 U.S.C. § 1603. For example, the FSIA provides for attachment of certain property belonging to foreign states, 28 U.S.C. § 1610; whereas, before the FSIA, the United States adhered to the doctrine of absolute immunity for foreign states from attachment. Von Mehren, *supra*, at 42. And, in defining a foreign state's commercial activity solely by the *nature* of the conduct, 28 U.S.C. § 1603(d), the FSIA departed from prior law that considered the nature *and* purpose of such conduct. Von Mehren, *supra*, at 53.

And, although some of the FSIA's immunity exceptions track the commercial activity exception of the restrictive theory, those exceptions are delineated with a particularity not previously applied by United States courts. 28 U.S.C. § 1605(a)(1), (2).

Moreover, and as discussed above, the expropriation exception in particular departed from the doctrine and practice of foreign sovereign immunity that existed prior to the FSIA. For the first time, the expropriation exception creates *in personam* jurisdiction over foreign states for expropriations of property within their borders in violation of international law. *Even if the property is not present in this country*, a foreign state, according to the Ninth Circuit, is not immune if its agency or instrumentality owns or operates expropriated property and engages in commercial activity in the United States. 28 U.S.C. § 1605(a)(3); J. App. 61a.

Thus, the FSIA does not merely codify the State Department's restrictive theory of sovereign immunity; it enacted an entirely new substantive doctrine of sovereign immunity that, for the first time since *The Schooner Exchange*, eliminated the immunity of foreign states for certain expropriations of property within their own borders.

C. Retrospective Application Of The FSIA Is Contrary To Congressional Intent And Would Attach New Legal Consequences To Foreign States For Expropriations Of Property Within Their Borders.

1. In *Landgraf*, 511 U.S. 244, this Court recognized that retrospective application of a statute to events that pre-date its enactment is disfavored under American law, because "'the legal effect of conduct should ordinarily be assessed under the law as it existed when the conduct took place.'" *Id.* at 265 (citation omitted). Accordingly, it confirmed that congressional legislation is presumed to apply *prospectively* only, from the date of its enactment. *Id.*

Landgraf nevertheless acknowledged that a statute may be applied retrospectively if Congress has expressly and clearly so provided in the statute. *Landgraf*, 511 U.S. at 280. The standard for determining whether Congress has clearly provided for retrospective application is a demanding one. *I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001). The statutory language must be "so clear it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997).[8]

8. The retrospective application of a statute may nevertheless raise constitutional issues notwithstanding Congress' clear expression. For example, in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 534 (1998), this Court held that the Coal Industry Retiree Health (Cont'd)

Landgraf proposed the following example of a clear expression of Congressional intent to apply a statute retrospectively:

> [This Act] shall apply to all proceedings pending on or commenced after the date of enactment of this Act.

Landgraf, 511 U.S. at 260.

The FSIA contains no such provision and, indeed, nothing in the text of the FSIA satisfies the demanding test of unequivocally providing for its retrospect[illegible]pplication.

When Congress wanted to apply an FSIA provision retrospectively, it knew how to do so with clear statutory language. For example, when it enacted the 1996 amendments creating exceptions for state-sponsored terrorism, Congress expressly provided that the amendments "shall apply to any cause of action arising before, on, or after the date of enactment of this Act." Pub.L. 104-132 (amended 1996).

Indeed, several FSIA provisions suggest that Congress contemplated a purely *prospective* application of the statute. For example, the provision postponing the statute's effective date for ninety days is consistent with prospective intent, particularly when Congress intended that the delayed effective date was "necessary in order to give adequate notice

(Cont'd)

Benefit Act of 1992 was unconstitutional, in part, because Congress made it retrospectively apply to 1950, over forty years before the date of its enactment. *Id.* ("[t]he distance into the past that the [statute] reaches back to impose liability . . . and the magnitude of that liability raise substantial questions of fairness").

of the act and its detailed provisions to all foreign states." Pub.L. 94-583, § 8, 90 Stat. 2891 (1976); S. Rep. at 32. If Congress perceived no problem with applying the FSIA retrospectively, it would have seen little need to give foreign states notice of the statute before it went into effect. *See Lindh*, 521 U.S. at 326 (when Congress has not clearly stated the temporal reach of a statute, normal rules of statutory construction may eliminate even the possibility that Congress intended its retrospective application).

Respondent has argued that the "henceforth" language in the preamble confirms that Congress intended to apply the FSIA retrospectively. Response to Petition for Writ of Certiorari at 7. But that reading is at best one of several possible interpretations, and therefore falls far short of the "clear" expression of retrospective intent required by *Landgraf*. *See Bell v. Reno*, 218 F.3d 86, 90-91 (2d Cir. 2000), *cert. denied*, 531 U.S. 1081 (2001) (statutory language susceptible to multiple interpretations is insufficient expression of congressional intent of temporal scope). First, because the word "henceforth" suggests prospectivity, the preamble has been understood to reflect just the opposite of what Altmann asserts, *i.e.*, Congressional intent to apply the FSIA *prospectively*. *Jackson v. People's Republic of China*, 596 F. Supp. 386, 388 (N.D. Ala. 1984), *aff'd*, 794 F.2d 1490 (11th Cir. 1986). And, in *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), the District of Columbia Circuit noted that the "most probable meaning" of the preamble is that immunity would no longer be decided by the State Department because "henceforth" it would be addressed solely by the courts. *Id.* at 686.

It is therefore not surprising that no circuit court, even the Ninth Circuit, has found that the FSIA satisfies the first prong of the *Landgraf* test.[9]

2. *Landgraf* also prohibits retrospective application of a statute if to do so would have an improper retroactive effect, *i.e.*, "whether the new provision attaches new legal consequences to events before its enactment." *Landgraf*, 511 U.S. at 270. An improper retroactive effect may be found if retrospective application would "impair the rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. *Landgraf* also acknowledges that these may not be the only tests for determining whether the statute has an improper retroactive effect on the parties. *Id.* at 269. The determination of retroactivity should "come[] at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of

9. *Altmann*, J. App. 49a (assuming *arguendo* that Congress intended no departure from the presumption against retroactivity); *Hwang Geum Joo*, 332 F.3d at 685-686 ("[w]e find no clear indication the Congress intended 28 U.S.C. § 1605(a)(2) to apply to events occurring prior to 1952"); *Abrams v. Societe Nationale Des Chemins De Fer Francais*, 332 F.3d 173, 184 (2d Cir. 2003) ("[u]nder *Landgraf*, the first question is whether Congress clearly expressed its aim that the statute apply to pre-enactment events. We conclude it did not"); *Carl Marks & Co. v. U.S.S.R.*, 841 F.2d 26, 27 (2d Cir), *cert. denied*, 487 U.S. 1219 (1988) ("'nothing in [the FSIA's] language or legislative history indicates that . . . wholesale reactivation of ancient claims was intended'") (citation omitted); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987) ("to give the [FSIA] retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952)").

connection between the operation of the new rule and a relevant past event." *Id.* at 270.[10]

Under any analysis, applying the expropriation exception retrospectively has an impermissible retroactive effect, and the Ninth Circuit's suggestion otherwise is clearly wrong. In *Hughes Aircraft*, this Court applied the second prong of the *Landgraf* analysis to a statute that, like the FSIA, expanded the types of claims that could be maintained against a class of defendants and correspondingly eliminated defenses that existed under prior law. *Hughes Aircraft*, 520 U.S. at 948. *Hughes Aircraft* held that retrospective application of an amendment to the *qui tam* provision of the False Claims Act, 31 U.S.C. § 3730(b), which partially removed a bar to a suit by a private litigant on behalf of the United States, would eliminate a defense to *qui tam* suits that defendants had under prior law. *Id.* For that reason, the Court held that retrospective application of the amendment would "essentially create[] a new cause of action, not just an increased likelihood that an existing cause of action will be pursued." *Id.* at 950. The effect would be to create jurisdiction over a class of defendants where none would have existed before. *Id.* at 951.

10. In his concurring opinion (joined by Justices Kennedy and Thomas), Justice Scalia suggested that the Court instead should determine what relevant activity the statute appears to regulate and, once that determination is made, the relevant activity only should be regulated prospectively. *Landgraf*, 511 U.S. at 291. *See also Martin v. Hadix* (Scalia, J. concurring), 527 U.S. 343, 363 (1999). This alternative analysis has since been considered, either alone or with the second prong of the *Landgraf* test. *Johnson v. United States*, 529 U.S. 694, 702 (2000) ("[n]or, finally, has Congress given us anything expressly identifying the relevant conduct in a way that would point to a retroactive intent"); *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 946 n. 4 (1997) (no need to determine the relevant conduct for retroactivity purposes since all of the relevant conduct pre-dated the enactment of the statute).

The Ninth Circuit's decision conflicts with *Hughes Aircraft*. In the same way identified in *Hughes Aircraft*, the FSIA's expropriation exception creates a new cause of action against foreign states for expropriations in violation of international law that did not exist before its enactment, removes immunity that would have been extended, and creates jurisdiction that would not have been previously available.[11]

II. THE NINTH CIRCUIT'S REASONS FOR RESTROSPECTIVELY APPLYING THE EXPROPRIATION EXCEPTION ARE IN ERROR.

A. The Ninth Circuit's Four Reasons For Applying The FSIA Retrospectively Are Unfounded.

1. The Ninth Circuit's holding that Austria could not expect immunity in 1948 because it was a signatory to the 1907 Hague Convention (IV) on the Laws and Customs of War on Land ("Hague Convention") is simply wrong. J. App. 50a. The relevant Articles (Arts. 46, 47, *etc.*) of the Hague Convention do not apply at all to alleged acts by Austria on its own territory. These Articles form part of Section III entitled "Military Authority over the Territory of the Hostile State," which exclusively concerns the obligations of occupying states over occupied territories of other states. Obviously, at no time could Austria be considered an occupying state of its *own* territory. Hague Convention, 1 Bevans 631, 651, 1907 U.S.T. Lexis 29, *36-37 (1907).

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11. Retrospective application of the expropriation exception is equally impermissible under the alternative analysis proposed in the concurring opinions in *Landgraf* and *Martin*. The conduct affected by the FSIA, insofar as is pertinent here, is the expropriation of property by foreign states in violation of international law.

Additionally, the Hague Convention does not contain any express or implicit waiver of immunity, nor does it create a private right of action. *See Amerada Hess*, 488 U.S. at 442 (international conventions "do not create private rights of action" against foreign states in United States courts unless, by their express terms, the foreign state has agreed to United States jurisdiction); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1175 (D.C. Cir. 1994) ("[t]he cases are *unanimous* . . . in holding that nothing in the Hague Convention 'even impliedly grants individuals the right to seek damages for violation of [its] provisions'") (citations omitted) (emphasis added).

2. The Ninth Circuit further held that it was appropriate for a federal court today to speculate as to whether the State Department in 1948 might have recommended against absolute immunity if a foreign state was not "friendly" with the United States at the time, notwithstanding the absence of any historical evidence that the State Department ever took such a position. J. App. 49a-54a. The Ninth Circuit persisted in this holding even after the Executive Branch corrected it in its *amicus curiae* brief supporting the petition for panel rehearing and rehearing *en banc*:

> The panel's opinion relies upon the mistaken belief that, during the pre-1952 period, the courts were free to exercise *in personam* jurisdiction over [a] foreign sovereign with respect to actions in its own territory if the United States did not have 'friendly' relations with the sovereign at the time of the challenged conduct.

J. App. 137a. *See also* Howard W. Briggs, The Law of Nations 444 (2d Ed. 1952) ("American courts have granted immunity from suit to governments not recognized by the United States,

. . . to extinct former governments, . . . and have not regarded the existence of war between the United States and the government claiming immunity as a bar to the claim of immunity") (citations omitted).[12]

3. The Ninth Circuit also created an exception to the rule of absolute immunity never before recognized by United States courts: that because Austria applied the restrictive theory of sovereign immunity in its own courts in 1948, it "could have no reasonable expectation of immunity in a foreign court." J. App. 54a. That approach affords no basis for applying the expropriation exception to Austria's 1948 conduct. First, in *Sabbatino*, this Court expressly declined to recognize the "reciprocity of treatment" theory beyond its very limited application to the conclusiveness of judgments. *Sabbatino*, 376 U.S. at 411. Second, as of 1952, reciprocity as a basis for asserting jurisdiction against foreign states also had been rejected by all (including Austria) but a handful of other countries. H. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 246 (1951).

Even if the Ninth Circuit's reciprocity approach were appropriate, which it is not, it would be irrelevant here. Under the restrictive theory of sovereign immunity before enactment of the FSIA, the United States *and* Austria considered expropriations by sovereigns within their own territories to be among the uniquely public acts for which foreign states were absolutely immune. Boyd, *supra*, at 1020; Joseph M.

12. In her response to the petition for certiorari, even Altmann acknowledged the error in the Ninth Circuit's speculative approach. *See* Response at 12 n. 11 ("[i]t seems pointless to speculate what a hypothetical President Truman administration might have done if confronted with this case in the immediate post-war era").

Sweeney, *Policy Research Study: The International Law of Sovereign Immunity*, U.S. Dept. of State 1, 46 (1963); Lauterpacht, *supra*, at 257. Hence, Austria's adoption of a restrictive theory could not have altered its settled expectation of immunity in this country for an expropriation within its borders, as it would have extended the same immunity to the United States.

4. The panel's miscomprehension of the restrictive theory is further evidenced by its baffling suggestion that foreign states had a *greater* expectation of absolute immunity for "economic transactions" than for expropriations of property within their territory. J. App. 55a-56a. Expropriations are precisely the kinds of public acts for which immunity was uniformly extended even under the restrictive theory. Lauterpacht, *supra*, at 250-268.

B. The Ninth Circuit Seriously Misread The Historical Record.

1. The most telling indication of the dangers inherent in the Ninth Circuit's speculative approach is the degree to which the court misread the historical record in reaching its conclusion. The Ninth Circuit concluded that Austria had no expectation of immunity in 1948 because the Republic's alleged expropriation – which occurred two years *after* Austria's democratic government was restored and recognized by the United States – was "closely associated with the atrocities of the War," which had concluded three years earlier. J. App. 51a.

First, this assertion assumes incorrectly, among other things, that a nation's status as a belligerent affected the State Department's policy of immunity in United States courts. *Supra*, at 29. By contrast, other courts have confirmed that

even Imperial Japan and Nazi Germany had settled expectations of absolute immunity for their direct conduct during the war. *Hwang Geum Joo*, 332 F.3d at 686 (holding that Japan had a settled expectation of absolute immunity for crimes committed during World War II); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001) (holding that Germany is immune from claims concerning its treatment of slave laborers in Nazi concentration camps); *Princz*, 26 F.3d at 1174 (declining to assert jurisdiction over claims by American forced into slave labor in Nazi Germany); *Djordjevich v. Bundesminister Der Finanzen, Federal Republic of Germany*, 827 F. Supp. 814 (D.D.C.), *aff'd* (unpublished) 124 F.3d 1309 (1993) (recognizing Germany's settled expectation of absolute immunity in United States courts for Nazi expropriations).[13]

On petition for rehearing *en banc*, the Ninth Circuit ignored the Executive Branch's admonition that its conclusions were based on faulty historical information. J. App. 141a ("[t]he panel's belief that the Executive Branch had in fact adopted a policy after the war to deny Germany

13. In holding that the FSIA did not have an impermissible retroactive effect, the Ninth Circuit relied on the lone *dissenting* opinion in a District of Columbia Circuit case, *Princz*, 26 F.3d at 1166 – and overstated the part of the holding of that case with which it claimed the dissent agreed. J. App. 46a-47a. The majority in *Princz* did *not* hold that the FSIA may be applied retrospectively, but merely postulated that an argument may be made for that proposition. *Princz*, 26 F.3d at 1170. The District of Columbia Circuit has since *repudiated* that *dicta*, and has held that the FSIA may not be applied retrospectively to any foreign state before 1952. *Hwang Geum Joo*, 332 F.3d at 683 ("a foreign sovereign justifiably would have expected any suit in a court in the United States – whether based upon a public or a commercial act – to be dismissed unless the foreign sovereign consented to the suit").

and Austria immunity from Nazi-era claims rests upon a misreading of the historical evidence"). Indeed, the Ninth Circuit opinion cited no case, because there is none, in which the State Department before the FSIA recommended that Austria be denied the absolute immunity enjoyed by all other nations in the United States. Moreover, there is no reported decision known to petitioners in which *in personam* jurisdiction was asserted over the Republic of Austria or, for that matter, any other nation, for a World War II era expropriation claim before enactment of the FSIA.[14]

While the degree to which some Austrians cooperated with Nazi Germany was of concern during and after World War II, the United States confirmed to the Court of Appeals that, *as a matter of unequivocal foreign policy*, this country and its allies considered that Austria was *not* an "unfriendly" nation during or after the war. J. App. 138a. Under the Declaration of Moscow of November 1, 1943, the Allied Powers recognized Austria as an occupied country and, hence, not a belligerent nation. *Id.* ("[t]he United States was not at war with the State of Austria. To the contrary, the United States took the view that Austria was the first country to be occupied by Nazi Germany"). And, shortly after the war, the

14. The Ninth Circuit's failure to correct its decision in light of the government's *amicus curiae* brief below cannot be reconciled with this Court's instruction that courts must accord significant weight to the position of the Executive Branch on matters touching on foreign affairs. *See Verlinden*, 461 U.S. at 486 ("this Court consistently has deferred to the decisions of the political branches – in particular, those of the Executive Branch – on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"). The Ninth Circuit's amended decision, issued after receipt of the *amicus* brief, neither mentioned the position of the Executive Branch nor the documented history that it presented.

State Department publicly acknowledged that "[t]he United States has accordingly regarded Austria as a country liberated from forcible domination by Nazi Germany, and not as an ex-enemy state or a state at war with the United States during the second World War." *United States Policy on Status of Austria*, October 29, 1946, Dep't St. Bull., Vol. XV, No. 384, Nov. 10, 1946, at 865 (hereinafter, "*Policy on Austria*"). Br. App. 9a.

Once Austria was liberated, a provisional government was formed in Vienna and, on April 27, 1945, the reestablished democratic government issued its Proclamation of Independence. J. App. 212a-214a at ¶¶ 4-7. The post-war Austrian government was recognized by the United States and the other Allies on January 7, 1946. Later that year, the State Department confirmed that "the United States Government recognizes Austria for all purposes, including legal and administrative, as a liberated country comparable in status to other liberated areas." *Policy on Austria*, Dep't St. Bull. at 895. Br. App. 10a.

The United States went well beyond mere recognition of Austria, by actively advocating its acceptance by other nations, as well. In a 1947 address to the United Nations, the United States insisted that Austria was entitled to establish diplomatic relations with the community of nations, enter into international agreements and "exercise other attributes of statehood." Statement On Austria By United States Representative On The Membership Committee, August 4, 1947, *Report of the Committee on the Admission of New Members*, Security Council Official Records, Second Year, Special Supplement No. 3, at 49 (1947) (Br. App. 17a). The United States thus "strongly opposed" any effort to postpone Austria's membership in the United Nations until a formal treaty was reached with its newly elected

government. *Id.* at 19a. The assertion that the Executive Branch would have recommended in favor of a United States court disregarding Austria's sovereign immunity, at the same time it was advocating to the world that Austria must be accorded all of the rights and privileges of a sovereign state, is in clear conflict with the facts.

The Ninth Circuit's conclusion that Austria was a belligerent nation not entitled to the same expectations of absolute sovereign immunity as accorded to other foreign states is thus contrary to the historical record, in addition to being legally incorrect.

2. The Ninth Circuit's finding that Austria had no expectation of sovereign immunity in 1948 because the State Department after World War II adopted "a policy to remove obstacles to recovery for victims of Nazi expropriations," J. App. 51a, also is contrary to this Court's recent historical findings in *American Insurance Association v. Garamendi*, __ U.S. __, 123 S. Ct. 2374 (2003), that United States policy directed expropriation claims into diplomatic, rather than judicial, channels. *Garamendi* recognized that, after the cessation of hostilities in World War II, "confiscations and frustrations of claims fell within the subject of reparations, which became a principal object of Allied diplomacy soon after the war." *Id.* at 2380. *See also* the United States' *amicus curiae* brief below, J. App. 144a, confirming that restitution was exclusively a diplomatic matter.[15]

15. The Ninth Circuit's reliance on the so-called "Bernstein Letter" is unfounded. J. App. 151a. First, the 1949 letter from the State Department was in response to an opinion of the Second Circuit declaring that it could not pass on the validity of confiscations by the former Nazi regime in a claim against a *Dutch corporation*. *Bernstein v. N.V. Nederlandshe-Amerikaansch Stoomvaart-*
(Cont'd)

The agreements between the post-war Republic and the United States confer on Austria exclusive jurisdiction to address restitution of property expropriated by the Nazis in Austria. J. App. 211a, 213a-216a at ¶¶ 3, 7-10. *See also* Ignaz Seidl-Hohenveldern, *Austria: Restitution Legislation*, 2 Am. J. Com. L. 383, 388 (1953) ("[t]he Occupying Powers have left to Austrian legislation and to Austrian courts all restitution cases, where the act of dispossession took place in Austria").[16]

(Cont'd)

Maatschappij, 210 F.2d 375 (2d Cir. 1954). Nothing in the letter suggests that it was intended to create an exception to the absolute immunity of any foreign state, especially Austria. Indeed, the Executive Branch has never issued any statement applying the Bernstein Letter to Austria for any act associated with Nazi conduct. Moreover, in relying on the Bernstein letter, the Ninth Circuit ignored the fact that Austria's ownership of the paintings rests on events in 1925 and 1948, and not on Nazi confiscations. Importantly, the Executive Branch disavows the Ninth Circuit's use of the Bernstein Letter to assert jurisdiction in this case. J. App. 143a.

16. The Ninth Circuit erroneously relied in its April 28, 2003 amended opinion on the 1943 Inter-Allied Declaration Against Acts of Dispossession Committed In Territories Under Enemy Occupation or Control (the "London Declaration") for the proposition that the United States would have recommended against sovereign immunity in our courts immediately after World War II. However, the Explanatory Memorandum to the London Declaration specifically provided that the authority to decide the rightful owners of forcefully transferred property fell to the legitimate post-war government of the territory in which the property was located. Inter-Allied Declaration Against Acts of Dispossession Committed In Territories Under Enemy Occupation or Control and Explanatory Memorandum, January 5, 1943. Br. App. 11a, 15a at ¶ 5.

3. After the war, the western Allies moved quickly to end their post-war occupations and to re-establish Austria and the other occupied countries as buffers against Soviet expansion. *Garamendi*, 123 S. Ct at 2380. In this regard, the protection of Austrian sovereignty by the United States was one of the first diplomatic battles of the Cold War. From 1946 to 1955, the United States continuously pressed the Soviet Union to end its occupation of eastern Austria. In so doing, the United States was intent on countering Soviet designs on Europe after World War II. Günter Bischof, Austria In The First Cold War, 1945-55, 47 (MacMillan Press Ltd. 1999) ("[a]t the end of the war, then, Austria was quickly emerging as a premier battleground in the slowly emerging antagonism with the Soviet Union); *Garamendi*, 123 S. Ct. at 2380.

Given the Cold War history and the United States' recognition of Austria's post-war government in 1946, it is inconceivable that the United States would have advocated in 1948 that Austria be stripped of sovereign immunity in United States courts – especially on the subject of reparations. Subjecting Austria to civil suits in the United States at that time would have interfered with the United States' determined foreign policy of supporting the emerging post-war democracies by referring all wartime restitution claims to diplomatic channels or to their countries of origin. *See Garamendi*, 123 S.Ct. at 2390 (the issue of restitution "has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century . . . , just as it was addressed in agreements soon after the Second World War").[17]

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17. The Ninth Circuit's assertion that jurisdiction may be asserted against Austria for its "perpetuation of the discriminatory

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The Ninth Circuit's understandable moral indignation over Nazi war-crimes, the Nazis' systematic plundering of Jewish property throughout Europe, and their looting from the Bloch-Bauer family, J. App. 51a, cannot be a substitute for sound judicial reasoning according to law. The Ninth Circuit erred in holding that Austria's expectations of absolute immunity for an alleged expropriation in 1948 of property within its territory would have been different from those of any other foreign state.

C. Whether The Expropriation Exception Applies To Pre-Enactment Conduct Requires A Categorical Answer Not Specific To Any One Foreign State.

In asking whether *Austria*, in particular, could in 1948 have "legitimately expected" to be haled into a United States

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expropriation," J. App. 50a, is equally baseless, and finds no support in section 1605(a)(3). *See West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir.), *cert. denied*, 482 U.S. 906 (1987) ("[section] 1605(a)(3) applies to 'claims to compensation for taking'") (quoting Restatement (Third) of the Foreign Relations Law of the United States, § 455, comment c (1987)). The court's suggestion that a subsequent expropriation occurred in 1999 also fails. J. App. 59a. The Complaint confirms that there was no "taking" of property in 1999, as the Republic had been in possession of the paintings since 1948. Also, the Complaint does not allege, and there is no basis to claim, that even if Austria had acted improperly in 1999, it acted in violation of international law by discriminating against aliens. J. App. 185a at ¶¶ 76-78. Austria *created* its art restitution act to address claims of past wrongful conduct. Since 1998, Austria has returned hundreds of millions of dollars of artwork in its museums to other persons who are not Austrian citizens (such as other Jewish Holocaust survivors) – including approximately one million dollars of property to Altmann and her family. J. App. 182a, 185a at ¶¶ 71, 76.

federal court "for its [alleged] complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings," J. App. 50a, the Ninth Circuit avoided the right questions, and asked the wrong one.

Congress either did, or did not, intend for the expropriation exception to apply to pre-FSIA enactment expropriations. If Congress enacted section 1605(a)(3) to deny foreign states sovereign immunity only for claims concerning expropriations *after* its effective date, then petitioner's motion should have been granted and the case dismissed. On the other hand, if Congress enacted a statute that unequivocally directed courts to assert jurisdiction over claims respecting expropriations by foreign states, *even if they occurred many decades ago*, then the Court of Appeals should have directed the case to proceed without resort to its historical analysis of Austria's particular expectations in 1948.

The expropriation exception means either one thing or the other, and there is no good reason for avoiding that general question, as the Ninth Circuit did. J. App. 46a ("[w]e need not reach the broad conclusion of the district court that the FSIA may be generally applied to events predating the 1952 Tate Letter").

Which statute did Congress enact? *Landgraf* supplies the answer. Because the statute and its legislative history lack any clear statement that section 1605(a)(3) applies to pre-enactment expropriations, the courts must treat it as if it expressly applied only to expropriations on or after its effective date (which Congress expressly provided would be ninety days *after* its enactment). Pub. L. 94-584, § 8, 90 Stat. 2891 (1976); *Landgraf*, 511 U.S. at 272 ("[r]equiring clear intent assures that Congress

itself has affirmatively considered the potential unfairness of retroactive application").

Particularly in matters such as this, the clearest legislative mandate is required to change such longstanding rules affecting the United States' relations with sovereign states. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (absent a clear statement of legislative intention, courts should prefer the statutory construction that minimizes potential interference with international relations); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (to sanction the exercise of United States jurisdiction in the "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed"). That mandate does not exist in the FSIA.

The Court of Appeals, in contrast to *Landgraf*, refused to analyze whether Congress intended to apply section 1605(a)(3) to pre-enactment expropriations. It asserted instead that the question requires no answer. In its view, the only proper query was whether Austria, in particular, could "legitimately expect" fifty-five years ago to be haled into a United States court for the conduct alleged in the Complaint. J. App. 150a. But that approach substitutes judicial speculation for any clear provision of subject matter jurisdiction or express legislative elimination of the immunity our nation's courts afforded to foreign states from at least 1812 to 1976. *Cf. Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) ("'Congress may abrogate [state sovereign immunity] only by making its intention unmistakably clear in the language of the statute'" (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)); *Nev. Dep't of Human Res. v. Hibbs*, __ U.S. __, 123 S. Ct. 1972, 1977 (2003).

Moreover, absent a clear expression by Congress, the question is not, as the Ninth Circuit asked, what were the individualized expectations of foreign states long ago; but, rather, does the expropriation exception "attach[] new legal consequences to events completed before its enactment"? *Landgraf*, 511 U.S. at 270. *Landgraf* mandates that this inquiry consider "the nature and extent of *the change in the law* and the degree of connection between the operation of the new rule and a relevant past event." *Id.* (emphasis added). The law of foreign sovereign immunity in the United States in 1948 was clear. *All* foreign states were absolutely immune for expropriations of property within their territories. *Supra*, at 16. The FSIA's expropriation exception represented a change in that law in 1976. Knowing that, the Court of Appeals' inquiry should have stopped, and the case should have been dismissed.

It was no more appropriate under *Landgraf* for the Ninth Circuit to speculate whether the *State Department* might have recommended an exception to the law in 1948 than to wonder whether *Congress* might have enacted or amended a statute fifty-five years ago. The only legitimate inquiry is what the law actually was, not what it might have been.

Congress did not exclude any foreign state from the FSIA's initial provisions, nor extend to particular nations any unique privileges or liabilities.[18] Given this, the temporal scope of the FSIA can only properly apply categorically to

18. Indeed, when Congress intended to apply subsequent FSIA amendments to fewer than all countries, it clearly expressed its intentions in the text of the amendments, and plainly provided for their retrospective application, as it did with foreign states designated as state sponsors of terrorism. *See* 28 U.S.C. § 1605(a)(7). *See also supra* at 24.

all foreign states. It cannot reasonably be applied retrospectively to one foreign state, and prospectively to others. To hold otherwise, as the Ninth Circuit did here, undermines the principles of fairness that are at the core of the presumption against retroactivity.

III. THE DECISION BELOW IS JUDICIALLY UNMANAGEABLE.

A. The Ninth Circuit's Analysis Is Incapable Of Consistent, Predictable Application.

Before *Altmann*, no circuit had found any reason to speculate about what the State Department might have done in connection with claims arising decades ago. In *Jackson*, 794 F.2d 1490, for example, the Eleventh Circuit did not speculate what the State Department might have recommended *vis-a-vis* China between 1911 and 1951. Nor did the Eleventh Circuit attempt to exclude any category of foreign states from the pre-1952 rule of absolute immunity, as the Ninth Circuit did with respect to foreign states that had adopted the restrictive theory of sovereign immunity. Instead, the Court conclusively presumed that China "relied on the . . . extant and almost universal doctrine of absolute sovereign immunity" in effect before 1952. *Id.* at 1497.

Similarly, the Second Circuit in *Carl Marks*, 841 F.2d 26, without resort to speculation concerning the specific expectations of the Soviet Union in 1918, held that "'only after 1952 was it reasonable for a sovereign to anticipate being sued in the United States.'" *Id.* at 27 (citation omitted).

Left undisturbed, the Ninth Circuit's decision mandates that district courts within the circuit reach their own conclusions about what the State Department would have done; what a court might have done in response; and what a given foreign state's

"expectations" would have been before 1952. Given the historical record, it is hard to imagine *any* foreign state being afforded anything less than absolute immunity in *any* case. Yet, that is what the Ninth Circuit concluded, and it is inevitable that district courts following its lead will reach contradictory holdings of what the State Department might have intended with regard to the immunity of specific countries. Indeed, different conclusions might be reached in different courts regarding the expectations of even a single country. This is not an abstract concern. In three pending cases, one of which is against Austria, the Second Circuit has remanded to the district courts to try to ascertain what the State Department's policies were for French railroads, Poland and Austria before 1952. *Abrams*, 332 F.3d 173; *Whiteman v. Austria*, 02-9361, 02-3087 (2d Cir. 2003); *Garb v. Republic of Poland*, 02-7844 (2d Cir. 2003). *See* Petitioners' Reply Brief on Petition for Writ of Certiorari ("Pet. Reply") 8 n. 8.[19]

Each of these cases has relied, to some extent, on the Ninth Circuit's holding that courts today should speculate about the expectations of particular nations, and the likely reactions of the Department of State, regarding foreign sovereign immunity in cases arising decades or more ago. Not surprisingly, in *Abrams*, the court expressed concern that the general history of sovereign immunity was insufficient

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19. In contrast, the District of Columbia's recent holding in *Hwang Geum Joo* is in express accord with the *Jackson* and *Carl Marks*:

> [A]pplication of the commercial activity exception to events that occurred prior to 1952 would impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns.

Hwang Geum Joo, 332 F.3d at 683.

to support such a factual determination. *Abrams*, 332 F.3d at 176, 186-188. And, in *Whiteman* and *Garb*, the court noted that "there exists the possibility that specific evidence of the Department of State's position with respect to a particular country during a given period of time . . . may not exist." Pet. Reply App. 10a.

B. Retrospective Application Of The FSIA Will Adversely Affect This Country's International Relations.

By adopting an analysis that requires judicial speculation about a foreign state's immunity over fifty years ago, the Ninth Circuit has created a process that virtually guarantees result-oriented decisions against foreign states based on contemporary prejudices and fears. Nowhere is this more evident than in this case which, although based on a 1948 expropriation, invokes vivid reminders of the Holocaust. As this Court and the Executive Branch have recognized since *The Schooner Exchange*, these are the very types of judicial decisions that the sovereign immunity doctrine is intended to prevent in light of the sensitive nature of the United States' relations with foreign states.

A system that invites litigants to cast aspersions on foreign states as a means of securing jurisdiction (because the more inflammatory the allegations, the less likely sovereign immunity) has little to recommend it. So too with a system that makes it impossible for foreign states – and the parties suing them – to predict whether sovereign immunity will be afforded, or not.

The Ninth Circuit's approach leaves foreign states with great uncertainty as to the retrospective application of the

FSIA and, hence, whether our courts will subject any one of them to United States jurisdiction for events that occurred over half a century ago.

Moreover, the reach of the lower court's decision, if affirmed, will extend far beyond this case. If the Ninth Circuit's approach to the application of sovereign immunity is allowed to survive, then it stands to reason that it will be applied by district courts to claims on expropriations by *any* foreign state to the decades and, indeed, centuries before the FSIA's enactment (assuming that a plaintiff can overcome applicable statutes of limitations, as Altmann claims she can in this case by her allegedly recent discovery of the 1948 expropriation). The specter of foreign sovereigns being required to defend in our district courts their historical relationship with the United States, case by case, is not to be lightly ignored. Should Great Britain or, for that matter, any former colonial power, be haled into United States courts over expropriations of artifacts that occurred throughout their former empires? Indeed, should *any* foreign state be subjected to review for possible United States jurisdiction for any expropriation performed during the wars or revolutions that occurred before the FSIA was enacted? Many nations and their national museums no doubt from time to time have precisely the type of "commercial" contact with the United States that the Ninth Circuit found sufficient here, and thus would be subject to the FSIA if our courts are permitted to apply the statute retrospectively.

Whether any nation should redress its wrongs of prior eras, and how it should do so, has historically been – and is rightfully still so – a matter to be determined by each foreign state, or by diplomacy between governments, not for adjudication in United States courts. It is hard to imagine

the United States tolerating a foreign court adjudicating the adequacy of its reparations to Native Americans (*see*, *e.g.*, 28 U.S.C. § 463 *et seq.*), or to Japanese Americans interred during World War II (*see* 50 U.S.C. § 1989 *et seq.)* – or adjudicating the United States' ownership of any painting that is and for decades has been located in the Smithsonian Institution. Yet, that scenario would arise if other countries were to adopt the approach taken by the courts below.

CONCLUSION

The expropriation exception of the FSIA cannot serve as the basis for jurisdiction over claims against foreign states based on conduct that occurred before the FSIA's enactment.

For all the foregoing reasons, petitioners respectfully request that the Supreme Court reverse the opinion below and remand with instructions to dismiss the action in its entirety for lack of subject matter and personal jurisdiction.

Respectfully submitted,

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APPENDIX A — LETTER FROM JACK B. TATE, ACTING LEGAL ADVISER FOR THE SECRETARY OF STATE, TO THE ATTORNEY GENERAL DATED MAY 19, 1952*

May 19, 1952.

MY DEAR MR. ATTORNEY GENERAL:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property

* Source, *Alfred Dunhill of London, Inc. v. Republic of China*, 425 U.S. 682, App. 2 (1976).

of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classified above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government

owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will

hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State:

JACK B. TATE
Acting Legal Adviser

APPENDIX B — UNITED STATES POLICY ON STATUS OF AUSTRIA, DEPARTMENT OF STATE BULLETIN DATED NOVEMBER 10, 1946*

[Released to the press October 29]

The Department of State considers that the visit to the United States of Dr. Karl Gruber, Foreign Minister of the Austrian Federal Republic, represents an appropriate occasion to reaffirm United States policy with respect to the status of Austria.[1]

1. Dr. Karl Gruber made a five-day informal visit to Washington from Oct. 25 to 29, where he was received by President Truman at the White House and participated in a series of conferences with officials of the Department of State.

On Oct. 25 Dr. Gruber met with Under Secretary of State Acheson to review the current Austrian situation and political problems of common interest to Austria and the United States. The Foreign Minister was informed that on Oct. 22 authorization was cabled to U.S. Military Headquarters in Austria to turn over $5,000,000 worth of monetary gold, claimed to have been originally owned by the Austrian National Bank and subsequently seized by the German Reichsbank. This gold, which is now in U.S. custody in Salzburg, will be restored to the Austrian Government upon presentation of satisfactory evidence of former ownership.

On Oct. 28 Dr. Gruber met with Under Secretary of State for Economic Affairs, William L. Clayton, and the heads of the various economic offices and divisions of the Department of State to discuss economic questions of importance to Austria, including the ration level in Austria and post-UNRRA relief for Austria. Dr. Gruber was

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* Source, Dept. of State Bulletin, Vol. XV, No. 384, Nov. 10, 1946.

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During the period following the first World War, the United States Government steadily encouraged the development of a free and independent Austrian state based on democratic principles, and viewed with strong disapproval all Nazi attempts to force Austria into the German Reich. The attitude of the United States toward the military occupation of Austria by Germany and its formal incorporation in the German Reich in 1938 was guided by this consideration and by the well-established policy of the United States toward the acquisition of territory by force. While, as a practical matter, the United States was obliged in its effort to protect American interests to take certain administrative measures based upon the situation created by

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assured that the United States would do its utmost to relieve the difficult situation in Austria. The discussion also covered financial questions, including the unfreezing of Austrian funds in the United States, which should commence directly upon the completion in Austria of certain preliminary technical steps.

On Oct. 29 Dr. Gruber met with Assistant Secretary Hilldring to consider various questions relating to political and economic problems in Austria. Dr. Gruber pointed out the political disadvantage of having within the frontiers of Austria a large group of displaced persons which represent in numbers about 10 percent of the Austrian population. General Hilldring promised the assistance of this Government in solving this problem as expeditiously as possible. Other matters discussed were the restoration of Danube barge traffic which is of vital importance to the economy of Austria and the operation of the United States section of the Allied Commission and its relations to the United States Government. Dr. Gruber was most appreciative of the assistance which General Clark and his personnel are rendering to Austria in the establishment of that country as a free and independent democracy.

the *Anschluss*, this Government consistently avoided any step which might be considered to constitute *de jure* recognition of the annexation of Austria by Germany.

In his radio address on May 27, 1941 President Roosevelt referred repeatedly to the seizure of Austria, and described the Austrians as the first of a series of peoples enslaved by Hitler in his march of conquest.[2] Secretary Hull stated at a press conference on July 27, 1942 that "this Government has never taken the position that Austria was legally absorbed into the German Reich".[3] In various wartime administrative measures in the United States, such as the freezing of assets, Selective Service, and registration of aliens, Austrian nationals were included in a separate category from the German or were assimilated to the nationals of countries which Germany seized or occupied by force.

2. BULLETIN of May 31, 1941, p. 648.

3. BULLETIN of Aug. 3, 1942, p. 660.

The United States has accordingly regarded Austria as a country liberated from forcible domination by Nazi Germany, and not as an ex-enemy state or a state at war with the United States during the second World War. The Department of State believes that this view has received diplomatic recognition through the Moscow Declaration on Austria[1] and the Declaration issued at Algiers on November 16, 1943 by the French Committee of National Liberation concerning the independence of Austria. In accordance with the objectives set forth in the Moscow Declaration to see reestablished a free and independent Austria, an Austrian Government was formed after free elections were held on November 25, 1945.[2] This Austrian Government was recognized by the four powers represented on the Allied Council, as announced simultaneously on January 7, 1946 in Vienna and the capitals of these states.[3] In its meeting of April 25, 1946 the Allied Council, moreover, considered a statement of the United States Government's policy in Austria made by General Mark Clark, and expressed its general agreement with section I, "Status of Austria", in which the United States maintained that since Austria had been liberated from Nazi domination it should be treated as a liberated area.

1. BULLETIN of Nov. 6, 1943, p. 310. See also BULLETIN of Nov. 20, 1943, p. 344.

2. BULLETIN of Oct. 21, 1945, p. 612. See also BULLETIN of Oct. 28, 1945, p. 665.

3. BULLETIN of Jan. 20. 1946, p. 81.

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In the opinion of the Department of State, the judgment of the International Military Tribunal rendered at Nürnberg on September 30-October 1, 1946 gave further international confirmation to this view of Austria's status by defining the invasion of that country as an aggressive act—"a premeditated aggressive step in furthering the plan to wage aggressive wars against other countries". The Nürnberg judgment also states that "Austria was in fact seized by Germany in the month of March 1938".

In order to clarify the attitude of the United States Government in this matter, the United States Government recognizes Austria for all purposes, including legal and administrative, as a liberated country comparable in status to other liberated areas and entitled to the same treatment, subject only to the controls reserved to the occupying powers in the new agreement on control machinery in Austria of June 28, 1946.[4] The United States Government believes that the international acts mentioned above are adequate reason for all members of the United Nations to regard Austria as a liberated country.

4. BULLETIN of July 28, 1946, p. 175.

APPENDIX C — INTER-ALLIED DECLARATION AGAINST ACTS OF DISPOSSESSION COMMITTED IN TERRITORIES UNDER ENEMY OCCUPATION OR CONTROL AND EXPLANATORY MEMORANDUM DATED JANUARY 5, 1943*

Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control (with covering Statement by His Majesty's Government in the United Kingdom and Explanatory Memorandum issued by the Parties to the Declaration)

London, January 5, 1943

His Majesty's Government in the United Kingdom have to-day joined with sixteen other Governments of the United Nations, and with the French National Committee, in making a formal Declaration of their determination to combat and defeat the plundering by the enemy Powers of the territories which have been overrun or brought under enemy control. The systematic spoliation of occupied or controlled territory has followed immediately upon each fresh aggression. This has taken every sort of form, from open looting to the most cunningly camouflaged financial penetration, and it has extended to every sort of property – from works of art to stocks of commodities, from bullion and bank-notes to stocks and shares in business and financial undertakings. But the object is always the same – to seize everything of value that can be put to the aggressors' profit and then to bring the whole economy of the subjugated countries under control so that they must slave to enrich and strengthen their oppressors.

* Source, Government of Norway, Information from the Government and Ministries, http://odin.dep.no/jd/norsk/publ/utredninger/NOU/012005-020017/index-ved034-b-f-a.html (Nov. 13, 2003).

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It has always been foreseen that when the tide of battle began to turn against the Axis the campaign of plunder would be even further extended and accelerated and that every effort would be made to stow away the stolen property in neutral countries and to persuade neutral citizens to act as fences or cloaks on behalf of the thieves.

There is evidence that this is now happening, under the pressure of events in Russia and North Africa, and that the ruthless and complete methods of plunder begun in Central Europe are now being extended on a vast and ever increasing scale in the occupied territories of Western Europe.

His Majesty's Government agree with the Allied Governments and the French National Committee that it is important to leave no doubt whatsoever of their resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked, just as they have recently emphasised their determination to exact retribution from war criminals for their outrages against persons in the occupied territories. Accordingly they have made the following joint Declaration, and issued the appended explanatory memorandum on its meaning, scope and application: –

Declaration

The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece; India, Luxembourg; the Netherlands; New Zealand; Norway; Poland; the Union of

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Soviet Socialist Republics; Yugoslavia; and the French National Committee:

Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

Accordingly, the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers of dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

The Governments making this Declaration and the French National Committee solemnly record their solidarity in this matter.

Note on the meaning, scope and application of the Inter-Allied Declaration against acts of dispossession committed in territories under enemy occupation or control.

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1. The Governments who have to-day issued this Declaration include all the Governments of the United Nations who have suffered the invasion of their national territory by brutal and rapacious enemies.

2. The Declaration is being communicated on behalf of all parties to the Governments of the other United Nations, with an invitation to consider marking their adherence to the principles embodied in the Declaration by some pronouncement of their own. The Declaration is also being brought to the notice of neutral Governments. The parties to the Declaration are collaborating to arrange the maximum publicity for it, through the press and by broadcasting.

3. The Declaration is in the form of a general statement of the attitude of the participating Governments and of the French National Committee towards the acts of dispossession of whatever nature, which have been, and are being increasingly, practised by the enemy Powers in the territories which they have occupied or brought under their control by their successive aggressions against the free peoples of the world. The Declaration makes it clear that it applies to transfers and dealings effected in territory under the indirect control of the enemy (such as the former "unoccupied zone" in France) just as much as it applies to such transactions in territory which is under his direct physical control.

4. In the Declaration the parties "reserve all their rights" to declare invalid transfers of or dealings with property, rights, etc., which have taken place during the period of enemy occupation or control of the territories in question. It is obviously impossible for a general declaration of this nature

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to define exactly the action which will require to be taken when victory has been won and the occupation or control of foreign territory by the enemy has been brought to an end. Dispossession has taken many forms and all will require consideration in the light of circumstances which may well vary from country to country. The wording of the Declaration however, clearly covers all forms of looting to which the enemy has resorted. It applies, e.g., to the stealing or forced purchase of works of art just as much as to the theft or forced transfer of bearer bonds.

5. In so far as transfers of dealings are confined in their scope to the territory of a particular country, the procedure of examination and the decision reached regarding their invalidation will fall to be undertaken by the legitimate Government of the country concerned on its return. The Declaration marks, however, the solidarity in this important matter of all the participating Governments and of the French National Committee, and this means that they are mutually pledged to assist one another as may be required, and, in conformity with the principles of equity, to examine and if necessary to implement the invalidation of transfers or dealings with property, rights, etc., which may extend across national frontiers and require action by two or more Governments.

6. The expression of solidarity between the parties also means that they are agreed so far as possible to follow in this matter similar lines of policy, without derogation to their national sovereignty and having regard to the differences prevailing in the various countries. The parties making the Declaration have accordingly decided as a first step in this

direction to establish a committee of experts, who will consider the scope and sufficiency of the existing legislation of the Allied countries concerned for the purpose of invalidating transfers or dealings of the nature indicated in the Declaration in all proper cases. The Committee have also been asked to receive and collect available information upon the methods adopted by the enemy Governments and their adherents to lay their hands upon property, rights, etc., in the territories which they have occupied or brought under their control. When a report is available from this committee of experts the whole question will be reviewed by the Governments making the Declaration and the French National Committee. The other Governments of the United Nations will be informed of the results of this enquiry.

APPENDIX D — STATEMENT ON AUSTRIA BY UNITED STATES REPRESENTATIVE ON THE UNITED NATIONS MEMBERSHIP COMMITTEE DATED AUGUST 4, 1947*

Statement by the representative of the United States of America at the twentieth meeting, on 4 August 1947, concerning the application of Austria

The United States believes that the absence of the treaty inspite of certain remaining impairments of Austria's freedom does not disqualify Austria from membership in the United Nations. The United States bases its views on these grounds:

1. *The Actual Restoration and International Recognition of a Separate Austrian State.* The Allied Powers have recognized in several international acts that Austria was a victim of Nazi aggression and in the Moscow Declaration regarded the administration imposed on Austria by Germany as null and void. This nullification has subsequently been accepted in fact by the establishment of a recognized Austrian Government and by appropriate measures for the severance of Austria from Germany.

2. *The Provisions of the New Control Agreement on June 28, 1946.* The New Control Agreement expressly provides that Austria may establish diplomatic relations with Government of United Nations, enter into international agreements and exercise other attributes of statehood. In our view, therefore, international recognition has already been

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* Source, *Report of the Committee on the Admission of New Members*, Security Council Official Records, Second Year, Special Supplement No. 3 (1947).

given without the conclusion of a treaty to the existence of Austria as a state capable of maintaining normal relations with other states in the international community as evidenced by the exchange of accredited diplomatic representatives between Austria and a number of countries since the signing of the New Control Agreement.

3. *The Character of the Projected Treaty.* It should be realized that the treaty in process of negotiation is not a peace treaty essential to the restoration of good relations between former belligerents. The treaty, according to presently agreed provisions, will be signed only by the Four occupying Powers and Austria. It is of dual character providing not only for engagements by Austria but also for certain commitments between the Four Powers themselves. It is at one and the same time a treaty with Austria and a Four Power agreement. In view of this we cannot say that the treaty is in any way necessary to the establishment of normal relations between Austria and members of the United Nations other than the Four Occupying Powers or necessary to Austria's ability to participate generally as an active member of international organizations.

4. *Undue Delay in the Conclusion of a Treaty.* The essential tasks of the occupation have been completed. The need of occupation no longer exists. As a consequence, the United States has earnestly endeavored to bring about completion of a treaty before this date, but has met an uncompromising attitude on some issues. It would be a manifest injustice to penalize Austria as an ex-enemy state for this protracted delay caused by disagreements among the Four Powers concerning among other things some highly

technical problems. The absence of an Austrian treaty caused by this inability to agree to certain articles and the continued unjustified occupation does not justify, in our opinion, the postponement of the admission of a state that otherwise has the essential attributes and institutions of statehood.

Under these circumstances we strongly opposed and are continuing to oppose any conclusion that the failure to complete a treaty should lead us to postpone consideration of Austria's application until next year or later. I strongly urge this Committee to recommend to the Security Council, of admission to the United Nations of Austria now.

APPENDIX E — STATUTES INVOLVED (28 UNITED STATES CODE)

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state;

or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or

damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of

settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the

court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 *(22 U.S.C. 2371)* at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act [8 USCS § 1101(a)(22)]) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit

had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of

admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following. Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)—

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.

(1) In general.

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action,

until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

Appendix E

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

Appendix E

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)

(1)

(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or

instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)

(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

Appendix E

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver. The President may waive any provision of paragraph (1) in the interest of national security.

No. 03-13

DEC 16 2003

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does the expropriation exception of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3), afford jurisdiction over claims against foreign states based on conduct that occurred before enactment of the FSIA and before the United States adopted the restrictive theory of sovereign immunity in 1952?

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SUMMARY OF ARGUMENT

In 1976 Congress enacted the FSIA and announced that henceforth all claims by foreign states to sovereign immunity in United States courts would be governed by that statute. Petitioners' claim to immunity, which was made after this suit commenced in August 2000, should be judged under the FSIA. The FSIA is a jurisdictional statute that does not operate retroactively to control past conduct or have any other impermissibly retroactive effect. It does not determine the substantive rights and remedies of the parties before this Court, but addresses only whether our federal courts have the power to adjudicate them. These conclusions are supported by the language and history of the statute as applied to the particular legal relationship between the parties in this case. As such, the unanimous decision of the Ninth Circuit Panel should be affirmed.

STATEMENT OF THE CASE

This action was brought by Respondent Maria V. Altmann, an 87-year-old American citizen, to recover six paintings by Gustav Klimt confiscated from her uncle by the Nazis during World War II. The paintings subsequently came into the possession of Petitioner Republic of Austria ("Austria"), a foreign state, and are currently housed in the museum operated by Petitioner Austrian Gallery ("the Gallery"), an agency or instrumentality of Austria (Austria and the Gallery are collectively referred to as "Petitioners"). Following her uncle's death in 1945, Petitioners withheld the paintings from Mrs. Altmann, his rightful heir, under false pretenses that have only very recently been revealed to her as a result of an investigation conducted by an Austrian journalist.

Petitioners' recitation of the facts contains numerous errors, several of which Respondent noted in her Brief in Opposition

to the Petition for Writ of Certiorari ("Opp.") at pages 1-4.[1] Because most of these disputed factual issues are not material to the legal issues in this appeal, Mrs. Altmann respectfully refers the Court to the factual summaries set forth in her Complaint and the comprehensive opinions of the District Court and the Ninth Circuit Panel. *See* J. App. C-F, H. In this proceeding, the uncontested allegations in Mrs. Altmann's Complaint should be accepted as true. J. App. 44a.

As much as Mrs. Altmann would like the Court to address and be made fully aware of the substantive merits of her case, this appeal concerns only a threshold procedural question, namely, whether the district court's exercise of jurisdiction is impermissibly retroactive. That question can be decided through a dispassionate analysis of the statute in question, this Court's retroactivity jurisprudence and the legal relationship between the parties to this case.

Mrs. Altmann presumes from the limitation imposed by the Court on the question presented that the Court does not intend to revisit the other issues already determined by the Ninth Circuit Panel.[2] The Ninth Circuit concluded that Mrs. Altmann has satisfied the prerequisites of 28 U.S.C. § 1605(a)(3) by

1. For example, Petitioners continue to assert that Adele Bloch-Bauer bequeathed the paintings to the Gallery, although any reading of her will — whether common sense or according to either Austrian or United States law — shows this claim to be patently false. Opp. at 2 n.1. Further, Petitioners purport to rely on the 1948 "agreement" by Mrs. Altmann's attorney, Dr. Rinesch, when the Austrian Federal Law of December 4, 1998 declares such statements, made in the context of seeking export permits, to be unenforceable. The Chairman of Austria's Provenance Commission, Professor Ernst Bacher, has called the post-war practices leading up to such agreements "indefensible." *See* Washington Conference on Holocaust-Era Assets, Nazi-Confiscated Art Issues, Statement of Dr. Ernst Bacher, p. 455 at http://fcit.usf.edu/holocaust/resource/assets/heac4.pdf.

2. *See* Court Rule 24.1(a); *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253 (1999).

establishing that her case concerns: (i) rights in property taken in violation of international law, (ii) which property is owned or operated by an agency or instrumentality of a foreign state engaged in a commercial activity in the United States. *See* J. App. C, 57a-61a. The factual support for these conclusions is set forth in great detail in the Ninth Circuit Panel's opinion. Of particular significance for this appeal is the uncontested fact that at the time the suit was brought in the year 2000, the paintings at issue were in the possession of an instrumentality of a foreign state that was engaged in a business activity in the United States, *e.g.* the advertising and selling of tickets for its exhibitions and the selling of catalogue books featuring the paintings at issue.

Mrs. Altmann's claims are not primarily claims for "expropriation" *by Austria*. Rather, Mrs. Altmann seeks the return of property taken in violation of international law from her uncle under the discriminatory laws of Nazi Germany and thereafter wrongfully withheld by Petitioners under false pretenses that have only recently been exposed. The gravamen of her Complaint is a claim for replevin seeking return of her uncle's six paintings or damages. *See* J. App. H, 200a. The paintings themselves came into the possession of the Petitioners at different times and in different ways. Three were obtained by trade or purchase during the Nazi era; the others were obtained by the Gallery only afterwards, in 1948 and 1988. Mrs. Altmann's suit was filed in the year 2000, following press reports revealing that Petitioners had defrauded Mrs. Altmann's family and their attorney after the War. It alleges that Mrs. Altmann has demanded return of the paintings and that Petitioners have refused to return them to her. In short, this lawsuit concerns Petitioners' present refusal to return the paintings, not the prior act of expropriation conducted by the Nazis.

With the factual predicates for the exercise of jurisdiction under the FSIA already established, the only relevant factual issues in this jurisdictional appeal concern Petitioners' purported

"expectations" of immunity from Mrs. Altmann's claims. In that regard, there are several undisputed historical facts:

- **Austria's long-standing treaty obligations require it to return looted artworks.** Austria is a party to the Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, 1907 U.S.T. LEXIS 29 (entered into force Jan. 26, 1910), Article 56 of which states "*All seizure of . . . works of art . . . is forbidden, and should be made the subject of legal proceedings*." (Emphasis added.) Furthermore, in the 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria ("Austrian State Treaty"), Article 26, paragraph 1, Austria agreed to restitute all unreturned Nazi-looted property.[3] *See* Opp. App. C; *Multilateral Austrian State Treaty*, TIAS 3298, 6 U.S.T. 2369, 1955 U.S.T. Lexis 35 (May 15, 1955).

- **Austria has never been immune in its own territory from Mrs. Altmann's claims.** After the War, Austria was occupied by the United States and the other Big Four allies. On May 10, 1945, less than two weeks after issuing its Proclamation of Independence, Austria declared that the discriminatory practices of the Nazis with regard to property would be reversed. J. App. I 214a. Austria's new government was recognized by the Allies in January 1946. 14 Dept. of State Bull. 81 (1946). Still under the United States and the other Allies' control and influence,[4] in May 1946 Austria passed the so-called *Nichtigkeitsgesetz* (Nullity Law), BGBl No. 106/1946, declaring all transactions that occurred as a result of Nazi persecution "null and void." *See* J. App. I, 214a-215a. Austria was further obligated by the United States to enact a series of laws designed to accomplish restitution of Nazi-looted property.[5] *Id.* The first three of these laws, enacted in July 1946 and February 1947, permitted claims by individuals against the Republic of Austria for the return of confiscated property that fell into government hands. *Id.* In other words, as early as 1946-47, legislation existed in Austria, a foreign state then occupied militarily by the United States and its Allies, that permitted claims against the State for the return of expropriated property — claims just like the ones made here by Mrs. Altmann.[6]

- **Jurisdiction in Austria over Mrs. Altmann's claims has continued to exist until today**. Austria admitted that it still affords an alternative jurisdiction for Mrs. Altmann's claims while arguing in the courts below that the case should be dismissed on *forum non conveniens* grounds. *See* J. App. I, 212a ("Plaintiff has an available forum for her claims in Austria"); J. App. M, 245a-246a (the statute of limitations may be extended beyond thirty years and does not bar Mrs. Altmann's claims). Even Austria recognizes that the jurisdiction afforded under the FSIA is not exclusive, but

3. Indeed, Congress was told that the treaty "provides that Austria will make restoration or provide compensation to victims of nazism, who were largely those of Jewish faith." Statement of John Foster Dulles, Secretary of State, before the United States Senate Committee on Foreign Relations, June 10, 1955, p. 4.

4. *See United States v. Portrait of Wally*, 2002 U.S. Dist Lexis 6445, *27 (S.D.N.Y. 2002) ("Until the signing of the Austrian State Treaty of 1955, the allies would 'sit in judgment' of the Austrian government, in that all official acts required their approval.").

5. In American-controlled areas of Germany, the United States enacted Military Law 59 (approved November 10, 1947), the stated purpose of which was "to effect to the largest extent possible the speedy restitution of identifiable property . . . to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism." The United States insisted that similar legislation be adopted by Austria. *See* J. App. I, 214a.

6. The history of Nazi-era expropriations and post-war restitution laws has been recently compiled by the Austrian Historical Commission, whose reports have been published on the website http://www.historikerkommission.gv.at. *See also* Robert Knight, *Restitution and Legitimacy in Post-War Austria 1945-1953*, Leo Baeck Inst. Yearbook XXXVI, pp. 413-441 (1991).

is concurrent with the jurisdiction of the Austrian courts over this matter. Indeed, it was only because of an oppressive filing fee requirement ($2 million) and a more difficult (although, according to Austria, not insurmountable) statute of limitations standard that Mrs. Altmann did not bring her suit in Austria. *See* Declaration of Stefan Gulner, J. App. K, 236a-242a; *see also* J. App. C, 66a-70a; J. App. D, 110a-113a.

- **The United States' public statements during the War provided clear and unambiguous notice that Nazi-looted property would have to be returned after the War.** In January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory (the "London Declaration), warning "that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled." 8 Dept. of State Bull. 21-22 (1943); Pet. App. C, 13a. Later that year, in the so-called "Moscow Declaration" of November 1, 1943, Austria was declared the first "victim" of Hitlerite aggression, but at the same time "reminded, however that she has a responsibility which she cannot evade for participation in the war on the side of Hitlerite Germany. . . ." 9 Dept. of State Bull. 310 (1943).

- **The initial United States' pronouncements just after the end of the War confirmed that individual claims for the return of Nazi-looted property could be made in the United States.** In 1949, the State Department issued a press release along with a letter submitted by Acting Legal Adviser to the State Department Jack B. Tate announcing that

  > it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of

  > such property; and . . . *the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.*

  Press Release No. 296, "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," reprinted in *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maat-Schaapj*, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam) (emphasis added).

- **The United States specifically informed the Austrian government that individual claims could be made for Nazi-looted property.** As stated above, Article 26 of the 1955 Austrian State Treaty confirmed Austria's obligation to restitute Nazi-looted property. In discussions thereafter, the United States confirmed to Austrian authorities that "the Government could not prevent private persons from advancing claims or arguing with the Austrian Government." Memorandum of Conversation between Secretary of State John Foster Dulles and Chancellor Julius Raab, May 19, 1958, reprinted in *Foreign Relations of the United States, 1958-1960*, Vol. IX, pp. 769-70 (1993). Claims for looted artworks have never subsequently been discussed or resolved diplomatically. *See* Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, TIAS 4253, 10 U.S.T. 1158, 1959 U.S.T. Lexis 253 (1959) (leaving unknown claims and looted art claims unsettled).

- **The more recent January 17, 2001 executive agreement with Austria preserves individual claims for the return of artworks.** The recent executive agreement concluded between the United States and Austria — the January 17, 2001 Joint Statement and Exchange of Notes concerning the establishment of the General Settlement Fund — expressly and conspicuously excludes and preserves

> individual claims for Nazi-looted artworks. *See* Opp. App. A, 2a-3a. Indeed, Mrs. Altmann's counsel participated at the invitation of the State Department in the negotiation of the executive agreement, and in connection therewith obtained a letter from Austria specifically affirming to the State Department that the executive agreement would not "affect or pertain to" Mrs. Altmann's case which was then pending.[7] *See* J. App. L, 243a — January 17, 2001 Letter from Hans Winkler, Legal Adviser, Austrian Federal Ministry for Foreign Affairs, to Stuart E. Eizenstat, Deputy Secretary of the Treasury.

It is against this historical backdrop, and clear reiteration of American policy to encourage the return of looted artworks, that the present appeal concerning the allegedly impermissible retroactivity of the FSIA in this case must be judged. As demonstrated below, this Court's retroactivity jurisprudence teaches that the exercise of jurisdiction in this case would simply provide a jurisdictional basis for implementing American policy, would not operate retroactively and would not have any impermissibly retroactive effects on the rights or remedies of the parties.

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7. Initially, Petitioners nevertheless attempted to assert an "act of state" defense based on the executive agreement in their motion to dismiss before the district court below. After objections were raised by the State Department, Petitioners expressly withdrew the argument that Plaintiff's claims were barred by the act of state doctrine and filed a statement confirming that

> (1) Plaintiff's claims in this action are not subject to the provisions of the Joint Statement and Exchange of Notes, including those provisions regarding legal closure; (2) This action shall not affect the establishment and funding of the General Settlement Fund as provided for in the Joint Statement and Annex A to the Exchange of Notes.

Supplemental Memorandum Re: Motion to Dismiss Under Fed. R. Civ. P. 12(b) filed February 21, 2001.

LEGAL ARGUMENT

A. Jurisdiction Under The FSIA In This Case Is Not Impermissibly Retroactive.

Petitioners and their *amici curiae* address nearly all of their argument to the hypothetical question of whether foreign countries would have been immune from suit in the United States in a case concerning expropriated property decades prior to the enactment of the FSIA. In Mrs. Altmann's view, this narrow approach misses the point. Indeed, the Court's recent retroactivity jurisprudence dictates a completely different analysis.

The principal question raised by the Petitioners is whether the application of § 1605(a)(3) of the FSIA in a case concerning events which occurred before its effective date is impermissibly retroactive. This Court has set forth a two-part test to answer this question: (1) whether Congress has directed with the requisite clarity that the law be applied retrospectively; and (2) whether application of the new statute produces an impermissible retroactive effect. *I.N.S. v. St. Cyr*, 533 U.S. 289, 316-20 (2001); *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf* at 269, citing *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring in part and concurring in judgment). Instead, "[t]he inquiry into whether a statute operates retroactively demands a common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' This judgment should be informed by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999) (quoting *Landgraf* at 270).

This Court has extensively addressed the retroactivity of civil statutes in at least five cases in the past decade. *St. Cyr*; *Martin*; *Lindh v. Murphy*, 521 U.S. 320 (1997); *Hughes Aircraft Co. v. United States ex rel Schumer*, 520 U.S. 939 (1997); and *Landgraf*.[8] All of these cases concerned whether to apply a modification of a pre-existing statute.

In this case, by contrast, the Court will address the purportedly impermissible retroactivity of a statute that replaced a federal common law doctrine rather than an earlier statute. This is an important distinction, because the Court's understanding and pronouncement of the common law evolves over time, and statements of federal common law by this Court are traditionally given retroactive effect. *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993). In *Harper* the Court explained:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id., 509 U.S. at 97-98; *see also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539 (1991) (opinion of Souter, J.) (a rule of federal law "is properly understood to have followed the normal rule of retroactive application" and must be "read to hold . . . that its rule should apply retroactively to the litigants then before the Court."). In deciding whether a new statute that replaces a common law doctrine is impermissibly retroactive, the new statute should be compared to the common law doctrine

8. *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) also discussed retroactivity principles but was not decided principally on that ground. *Eastern Enterprises* concerned a statute that replaced an industry-wide labor agreement. The case was decided as a takings and due process case, in which the general principles against retroactivity were cited as an analogy.

it replaced. By focusing on the state of the common law of sovereign immunity in 1938 or 1945 or 1952, as opposed to in 1976 or today, Petitioners set up a straw man that has no relevance to the question presented in this appeal.

The inquiry is further complicated by the fact that the common law rule in question concerns a defense to the exercise of jurisdiction. As this Court has stated on several occasions, a statute that merely confers or ousts jurisdiction does not normally raise any retroactivity concerns. *Landgraf*, at 274-5. As this court explained:

> We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. . . . [I]n *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604, 607-608 n. 6 (1978), we held that, because a statute passed while the case was pending on appeal had eliminated the amount-in-controversy requirement for federal-question cases, the fact that respondent had failed to allege $10,000 in controversy at the commencement of the action was "now of no moment." *See also United States v. Alabama*, 362 U.S. 602, 604 (1960) (per curiam); *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899). Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell [v. Commons]*, 239 U.S. [506] at 508 [(1916)]. Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties." *Republic Nat. Bank of Miami*, 506 U.S. at 100 (Thomas, J., concurring).

Landgraf at 274; *see also Landgraf* at 293 (Scalia, J., concurring) ("Our jurisdiction cases are explained, I think, by the fact that

the purpose of the provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power — so that the relevant event for retroactivity purposes is the moment at which the power is sought to be exercised."); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 857 (1990) (Scalia, J., concurring) ("Whether a particular application *is* retroactive" will "depend upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated."); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 713 n.17 (1974) (identifying prior cases in which new statutes were applied to pending cases).

The *Landgraf* case concerned the application to a case on appeal of a 1991 amendment to Title VII of the Civil Rights Act of 1964, which created the right to a jury trial to recover compensatory and punitive damages for intentional discrimination. The Court found that the statute did not clearly state whether it should be applied retroactively. *Landgraf* at 250-263. The Court then went on to the next step of the analysis and held that to apply the new rule to cases arising prior to the enactment would be akin to "creating a new cause of action." *Id.* at 283. By dramatically increasing the amount of damages available, the statute would impose on employers a "new disability" in respect to past events. *Id.* The Court found this to be impermissibly retroactive, and, barring a clear expression of statutory intent found within the statute, would not apply the new rule to cases arising prior to the enactment.

The application of the *Landgraf* holding to jurisdictional statutes was further clarified by this Court in a unanimous decision in *Hughes*. In that case, a statute phrased in jurisdictional terms altered the substantive law of the case by eliminating a defense to the relator's *qui tam* suit on the grounds that the government was aware of the information that formed the basis of the suit. By eliminating an essential element of the *qui tam* case the new statute altered the relationship between the parties. *Id.* at 948. The Court would not permit such a statute to operate retroactively to permit claims for relief that could

not have been asserted by the relator prior to the enactment of the new statute. Because the change in the statute affected the substance, indeed the very existence, of the claims, and not just the power of the court to hear the case, the statute could not be applied retroactively. The Court therefore distinguished the statute at issue in *Hughes* with other statutes conferring or ousting jurisdiction. The latter were still presumed to be applicable to all claims, even those arising prior to the enactment, because, unlike in *Hughes*, these statutes did not affect the substantive rights or liabilities of the parties but only the power of the court to hear the case. As the Court put it:

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among fora. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of the particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Hughes, 520 U.S. at 951 (emphasis in original) (citations omitted).

After *Landgraf* and *Hughes*, the question for jurisdictionally-phrased statutes is whether they modify the underlying rights and remedies of the parties, or merely "allocate jurisdiction." Examples of the latter include *Alabama*, a case in which the Court held that the new Civil Rights Act of 1960 should be applied in a pending case against a State that had previously been immune from such suits, and *Andrus*, where the Court applied the new federal-question statute that eliminated

the amount in controversy requirement for suits against the United States. *Landraf,* 511 U.S. at 274; *Republic*, 506 U.S. at 10[illegible] (Thomas, J., concurring); *Andrus*, 436 U.S. at 608; *Alabama*, 362 U.S. at 604. In both *Alabama* and *Andrus*, as the Court pointed out, the new statute eliminated a jurisdictional defense to the litigation previously available to a sovereign state, but that did not alter the pre-existing rights of the parties, which existed regardless of the forum in which those rights were litigated.

The remaining retroactivity cases, *Lindh*, *Martin* and *St. Cyr*, turned principally on the question of whether the statute was intended to be applied retroactively. In *Lindh*, a sharply divided Court considered a modification of the federal habeas statute. The majority, in an opinion by Justice Souter, found that by negative implication arising from a comparison to a neighboring provision, the new statute was intended by Congress to apply only to cases filed after the act became effective. *Id.* at 336. The dissent, authored by Chief Justice Rehnquist, found the statute to be "entirely procedural" and "jurisdictional" and therefore presumptively retroactive. *Id.* at 342-44.

In *Martin,* the Court considered the retroactive application of an attorneys' fees provision in the Prison Litigation Reform Act of 1995. The Court found that there was no clear expression of intent by Congress regarding the retroactive application of the statute, and the majority held that to apply the new limitation on fees to work completed before the enactment would unsettle the expectation of the parties. However, the new Act should and would be applied to all work completed after the effective date of the Act. *Id.* at 360-362.

Finally, in *St. Cyr*, a newly-enacted statute which eliminated any discretion to refrain from deporting an immigrant convicted of a felony was held by a sharply divided Court to be inapplicable to a person who pled guilty in reliance on the old statute. The majority, led by Justice Stevens, found no clear expression

of a legislative intention to apply the statute retroactively. *Id.* at 314-320. The dissent, authored by Justice Scalia, would have found that the new statute was unambiguous in its scope and that it expressly applied to all deportation proceedings.

These recent decisions provide the proper framework for the Court's consideration of the retroactivity question at issue in this case. Viewed from the proper perspective, they support Respondent's position in this case.

1. Did Congress Clearly Intend The FSIA To Apply To Cases Concerning Expropriations That Occurred Prior To The Effective Date Of The Act?

a. Introduction – Historical Concepts of Jurisdiction Against Foreign Sovereigns in the United States.

i. Constitutional and statutory authority for the exercise of jurisdiction over foreign states.

Federal jurisdiction over claims by United States citizens against foreign states was first authorized in Article III, Section 2 of the United States Constitution, which provided in pertinent part that:

> The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The jurisdiction granted to federal courts in the Judiciary Act of 1789 did not follow the quoted language of the Constitution, and the Act did not expressly provide for jurisdiction in actions against foreign states. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. However, perhaps because most suits against foreign states were brought under the federal court's admiralty, rather than diversity, jurisdiction, this lack of express statutory authority appears not to have been squarely addressed for many years.

In 1875, Congress enacted a new diversity statute that tracked the language of the Constitution and expressly provided for jurisdiction over "a controversy between citizens of a State and foreign states, citizens or subjects." Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. In 1948, the same language was adopted in 28 U.S.C. § 1332. *See* Act of June 25, 1948, ch. 646, 62 Stat. 930.

In 1976, Congress enacted the FSIA and shifted the grant of federal court jurisdiction for suits against foreign states from § 1332 to § 1330, where it remains today. Under § 1330, the district court is recognized as having:

> original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim to relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

Thus, pursuant to the authority granted in Article III, Section 2 of the Constitution, § 1330 expressly provides federal court jurisdiction for suits against foreign states. Such jurisdiction is, of course, limited by the statutory doctrine of sovereign immunity, as set forth in 28 U.S.C. § 1602, *et seq*. Section 1604 states that "a foreign state shall be immune from the jurisdiction of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. These exceptions to sovereign immunity set forth in §§ 1605 to 1607 "[provide] the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amarada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (FSIA contains "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities").

The second prong of § 1605(a)(3), the exception to sovereign immunity that Mrs. Altmann relied on and the Ninth Circuit Panel applied in this case, provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case .. . . in which rights in property taken in violation of international law[9] are in issue and . . . that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

This Court has not indicated that it will review the Ninth Circuit's decision that Mrs. Altmann has satisfied the requirements of this exception, and Respondent will not further discuss it.

ii. The common law doctrine of sovereign immunity.

The FSIA codified for the first time the principles of sovereign immunity to be applied in actions in United States courts. Prior to the enactment of the FSIA, courts applied, as "a matter of grace and comity on the part of the United States," a common law doctrine of sovereign immunity as a *defense* to the exercise of jurisdiction in actions against foreign states. *Verlinden*, 461 U.S. at 486. This common law principle of sovereign immunity was famously set forth by Chief Justice Marshall in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), a case concerning a claim to immunity made by the Republic of France against a libel to an expropriated warship that was forced by weather to enter the port of Philadelphia.

In *The Schooner Exchange*, Chief Justice Marshall confirmed at the outset that the sovereignty of the United States

9. As the Court noted in *Amarada Hess*, Congress rested the FSIA in part on its power under Art. I, sec. 8, cl. 10 of the Constitution "[t]o define and punish . . . Offenses against the Law of Nations." *Amarada Hess*, 488 U.S. at 436.

included the "full and absolute" power to adjudicate claims against foreign states made within the territorial jurisdiction of this country. *Id.* at 137. The Chief Justice noted:

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. . . . All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Id. at 136. Chief Justice Marshall's opinion held, however, that under the then-prevailing practice of nations, foreign states should be supposed to enter the jurisdiction of the United States only under an implied license affording immunity from claims concerning their public property, *e.g.* warships.

This implied license could be revoked upon fair notice, for example, by passing legislation expressly authorizing jurisdiction over foreign states. Absent such express legislation, Chief Justice Marshall would not recognize a rescission of the implied waiver of jurisdiction in any suit against a foreign state:

> Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give

> them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.

Id. at 146.

That the United States could revoke the "implied" license of sovereign immunity was confirmed by Justice Story, writing for the Marshall Court in *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), a case concerning a claim for restitution of goods on a seized warship that had docked in Norfolk, Virginia. As described by Justice Story:

> But as such consent and license is implied only from the general usage of nations, it may be withdrawn upon notice at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws in the same manner as other vessels. To be sure, a foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation.

Id. at 353.

Notably, in *The Santissima Trinidad*, Justice Story refused to extend the principle of implied sovereign immunity to bar a suit for restitution of goods on a seized warship, finding that such goods were not subject to the implied waiver of jurisdiction under the doctrine of sovereign immunity. *See Amarada Hess*, 488 U.S. at 437. Instead, Justice Story again confirmed the absolute right of the United States to exercise its complete jurisdiction in the following terms:

> It may therefore be justly laid down as a general proposition, that all persons and property within the

territorial jurisdiction of a sovereign, are amendable to the jurisdiction of himself or his Courts: and that the exceptions to this rule are such only as by common usage, and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would indeed be strange, if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon those who seek an asylum in our ports. We are of the opinion that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armaments and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our Courts, for the purpose of examination and inquiry, and if proper case be made out, for restitution to those whose possession has been devested by a violation of our neutrality; and if the goods are landed from the public ship in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge that if illegally captured they shall be exempted from the ordinary operation of our laws.

Id. at 353-54.

Notwithstanding Justice Story's opinion, *The Santissima Trinidad* was virtually ignored, and *The Schooner Exchange* was for many years mistakenly cited for the proposition that foreign states were "absolutely" immune from suit in United

States courts.[10] However, it now appears to be universally accepted that the opinions of the Marshall Court reveal an approach quite consistent with the modern understanding of the sovereign immunity doctrine.[11] Thus, the holding of *The Schooner Exchange* should probably never have been extended to claims against foreign states based on non-public activities, *i.e.* commercial or expropriation claims not involving purely governmental activities. Indeed, Chief Justice Marshall had written, "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual." *The Schooner Exchange* at 143; *see also Bank of U.S. v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824) (Marshall, C.J.). In *Planters' Bank of Georgia*, the Chief Justice had written:

> It is, we think, a sound principle that when a government becomes a partner in any trading

10. *See, e.g., Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562 (1926) (applying the "absolute" doctrine of sovereign immunity notwithstanding a circuit judge's opinion and the advice of the State Department supporting a more restrictive view that would have permitted claims against a commercial ship owned by Italy). *Cf. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 702 (1976) (*Pesaro* "no longer correctly states the law"); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 38 (1945) (Frankfurter, J., concurring) (criticizing holding in *Pesaro*); *Berizzi Bros. Co. v. The Pesaro*, 13 F.2d 468 (2d Cir. 1921) (Mack, J.) (setting forth case for restrictive theory of sovereign immunity).

11. *See* Michael D. Murray, "Jurisdiction Under the Foreign Sovereign Immunities Act for Nazi War Crimes of Plunder and Expropriation," 7 N.Y.U. J. Legis. & Pub. Pol'y __ (forthcoming, Spring 2004), text available at http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID451221_code030929570.pdf?abstractid=451221, Joseph W. Dellapenna, *Suing Foreign Governments and their Corporations*, pp. 2-3 (2003); Hersch Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 28 Brit. Y.B. Int'l L. 220, 229 (1951).

> company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

Id., 22 U.S. at 907. Justice Story was also very much in accord with this "restrictive" view. *The Santissima Trinidad*, *supra*; *United States v. Wilder*, 28 F. Cas. 601, 3 Sumn. 308, 315-317 (1838) (Story, J.) (government-owned merchant ship not entitled to same privileges and immunity as ship of war).

Nevertheless, it took almost 125 years for the Court to return to the restrictive theory of sovereign immunity suggested by the Marshall Court. *See Compania Espanola de Navigacion Maritima v. The Navemar*, 303 U.S. 68 (1938) (affirming jurisdiction over foreign state's claim to merchant ship); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945) (permitting claim against Mexican commercial ship absent State Department suggestion of immunity); *National City Bank of New York v. Republic of China*, 348 U.S. 356 (1955) (permitting counterclaims against China). This return coincided with the announcement by the State Department in the so-called Tate Letter of 1952 that the United States had adopted the "restrictive theory" of sovereign immunity to permit suits against foreign sovereigns for certain actions. Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. of State Bull. 984-85 (1952), and in *Alfred Dunhill*, 425 U.S. at 711 (Appendix 2 to opinion of White, J.). As has been demonstrated, the "history" presented in the Tate Letter of the "newer or restrictive theory of sovereign immunity" is largely inaccurate. It fails to recognize that the theory was not new at all, but rather conformed to the initial views of the Marshall Court (and, indeed, the views of the State Department as

expressed thirty years earlier in *The Pesaro*[12]). Rather than marking the beginning of a "new" approach to sovereign immunity, the Tate Letter in reality simply reflected a return to the original conception of that doctrine.

iii. The FSIA.

The FSIA codified what until 1976 had been a common law doctrine. The impetus for the legislation was a concern that because courts tended to follow recommendations of the State Department, sovereign immunity determinations were subject to political influences. The drafters of the FSIA (the State and Justice Departments) intended to

> insure that this restrictive principle of immunity is applied in litigation before U.S. courts. . . . A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

H.R. Rep. No. 94-1487 at 7; 1976 U.S.C.C.A.N. at 6605 (1976).

The FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by sovereign states before Federal and State courts in the United States," and "prescribes . . . the jurisdiction of U.S. district courts in cases involving foreign states." *Amarada Hess*, 488 U.S. at 435 n.3, quoting S. Rep. No. 94-1310, pp. 11-12 (1976), U.S. Code Cong. & Admin. News 1976, pp. 6604, 6610.

The stated purpose of the FSIA concerns the adjudication of "claims of foreign states to immunity" (a term used twice in section 1602).

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the

12. *See Berizzi*, 13 F.2d at 479-80.

> rights of both foreign states and litigants in United States courts. . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles of this chapter.

28 U.S.C. § 1602.

Each of the exceptions to sovereign immunity set forth in § 1605 required some jurisdictional contact with the United States. For example, the expropriation clause (§ 1605(a)(3)) required that the property at issue (or property exchanged with it) be present in the United States or owned or operated by an agency or instrumentality engaged in a commercial activity in the United States. As a result, the FSIA mandated that when subject matter jurisdiction existed under one of the exceptions to immunity, personal jurisdiction would also exist.[13] 28 U.S.C. § 1330.

b. Congress Intended The FSIA To Apply To All Claims To Immunity, Regardless Of When The Acts Underlying The Case Took Place.

The first question that must be addressed under this Court's retroactivity jurisprudence is whether Congress has directed with

13. In this regard, the FSIA appears to adopt the "minimum contacts" approach to jurisdiction, as in *International Shoe v. Washington*, 326 U.S. 310 (1945) and *Shaffer v. Heitner*, 433 U.S. 186 (1977), rather than the more territorial approach that prevailed in the 19th Century, as set forth in *Pennoyer v. Neff*, 95 U.S. 714 (1878). The second prong of § 1605(a)(3) arguably extends beyond the reach of the minimum contacts test, but this is of no moment in this case because the Ninth Circuit Panel found that the minimum contacts approach had been satisfied. J. App. C, 61a-64a. Neither that issue, nor the related issue of whether a foreign state is entitled to due process under the Fifth Amendment, is at issue in this appeal. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 619 (1992). In any case, suits such as this one between citizens of the United States and foreign states are expressly authorized in the Constitution. Thus, the territoriality question should raise no constitutional issues with regard to subject matter jurisdiction.

the requisite clarity that the FSIA be applied, as here, to cases that concern acts that predate the effective date of the statute. The Ninth Circuit did not decide this question and none of the other circuit courts that have addressed the issue has focused properly on the pertinent language of the statute or the particular provisions of the expropriation clause at issue in this case. The key is that because the FSIA concerns *claims to immunity*, and not the underlying claim for relief, Congress must certainly have intended the statute to apply to all pending cases regardless of when the underlying acts took place.

The FSIA announced new procedures for determining claims of foreign states to immunity. *Verlinden*, 461 U.S. at 488. This announcement is precisely what is required under *The Schooner Exchange* and *The Santissima Trinidad* to alert foreign sovereigns that if, by their conduct, they enter the jurisdiction of United States courts, their claims to immunity will be handled according to the new law. The FSIA specifically put foreign nations on notice that their "claims to immunity" would "henceforth" be adjudicated by United States courts under the rules and procedures set forth in the act. 28 U.S.C. § 1602. There was no ambiguity in this notice because it was directed to *claims to immunity made after the effective date of the Act*, without regard to the date of the underlying conduct.

With regard to the expropriation clause set forth in § 1605(a)(3), foreign states were warned that if they brought expropriated property to the United States or entrusted it to an agency or instrumentality engaged in a commercial activity in the United States, their claims to immunity would no longer be accepted.[14] The argument of Petitioners and their *amici curiae*

14. The 90-day delay between enactment and the effective date of the Act should also be seen in this light, to provide foreign states with sufficient time to sever jurisdictional contacts with the United States if they did not want to be subject to suits under the FSIA. H.R. Rep. No. 94-1487, at 33. *See* Pub. L. No. 94-583, § 8, 90 Stat. 2891, 2898 (1976) (Congress delayed FSIA's effective date "to give adequate notice of the act and its detailed provisions to all foreign states").

— that the word "henceforth" in § 1602 indicates that the statute was meant to apply only to claims for relief arising after the effective date of the Act — ignores the fact that § 1602 speaks only to "claims to immunity" and not to claims for relief. The FSIA focuses on the manner of adjudicating the claim to immunity, not the underlying claim.

The contention that the law of sovereign immunity is "substantive," as this Court stated in a completely different context in *Verlinden*,[15] does not answer the retroactivity question. Regardless of whether one considers the law of sovereign immunity in the FSIA to be "substantive" or "procedural," it is clear that the expropriation clause of the FSIA does *not* "operate retroactively." *Martin*, 527 U.S. at 359 ("When determining whether a new statute operates retroactively, it is not enough to attach a label (e.g. 'procedural.' 'collateral') to the statute; we must ask whether the statute operates retroactively.") Section 1605(a)(3) does not affect or pertain to liability or the substance of the underlying claim, but regulates only the sovereign immunity claim that may be raised in defense to the litigation in this forum. *See First Nat. City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 620-21 (1983); H.R. Rep. No. 94-1487 at 12, 1976 U.S.C.C.A.N. 6604, at 6610 ("The bill is not intended to affect the substantive law of liability.").

A claim to sovereign immunity arises only after a complaint is filed, and it must be judged based on the status of the defendant and the law of the forum at the time of the complaint. *Dole Food Co. v. Patrickson*, __ U.S. __, 123 S. Ct. 1655, 1662 (2003); *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993); *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824).

15. *Verlinden* concerned whether the FSIA was constitutional when it permitted suits by foreign citizens against foreign states, since such suits were not authorized under the Diversity Clause of Article III. The Court held that Congress had authority to establish such jurisdiction pursuant to the "Arising Under" clause, because the law of sovereign immunity was "substantive" law of the United States. *Verlinden*, 461 U.S. 480.

See also In re Muir, 254 U.S. 522 (1921) (Court considered British requisition of ship for use as admiralty transport at time of suit); *In re Hussein Lutfi Bey*, 256 U.S. 616 (1921) (Court considered status of Turkish ship in light of breakoff in relations between United States and Ottoman Turkey at time of suit); *The Gul Djemal*, 264 U.S. 90 (1924) (same); *The Navemar*, 303 U.S. at 73-74 (Court considered status of ship requisitioned by Spanish government at time of suit); *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943) (Court considered the good relations between Peru and the United States at time of suit).

Petitioners and their *amici curiae* studiously ignore this Court's recent holding in *Dole Food* because it is fatal to their argument. In *Dole Food*, the Court found that a privatized company could not claim sovereign immunity protection even though it would have qualified for such protection at the time the cause of action accrued. This Court rejected the contention that the FSIA regulates the conduct of the foreign sovereign, finding that the comparison to other status-based immunities was "inapt". *Id.* at 1663. According to *Dole Food*, the FSIA is directed to the exercise of jurisdiction over the defendant, which is based on the defendant's status at the time of suit. *Id.*

Dole Food controls the result in this case. The present tense has "real significance" in statutory construction. *Id.* at 1662. Section 1605(a)(3) purposely uses the present tense. It directs that, at the time of suit, the property at issue must be either present in the United States, or owned or operated by an agency or instrumentality that is engaged in a commercial activity in the United States. The statute speaks to the *current status* of the defendant and whether it is *currently* entitled to sovereign immunity in this forum. The FSIA does not look backward.

Therefore, consistent with this Court's opinion in *Dole Food*, the FSIA does not "operate retroactively" on the underlying claims, but concerns only the "claim to immunity" in this forum which arises when the complaint is filed. Similarly, the focus in the two expropriation cases of *The Schooner*

Exchange and *The Santissima Trinidad* was not the expropriation itself, which was contended to be in violation of international law, but the claim for sovereign immunity that arose (under a theory of implied waiver) when the ships entered United States ports. The activity regulated by the expropriation clause of the FSIA is the assertion of the court's jurisdiction in the present, not the underlying expropriation in the past.

A contrary reading would lead to untenable results. It would require overruling *Dole Food* because, under Petitioners' theory, the FSIA would be directed to the activity underlying the suit and immunity should be judged based on the facts that existed at that time. Indeed, if the Court followed Petitioners' argument, the United States would always be a safe haven for expropriated property in the United States so long as the property was taken prior to the effective date of the Act.[16] There is no basis, in the statute or the legislative history,[17] for such an awkward result.

16. Petitioners' retroactivity argument applies as much to the first prong of § 1605(a)(3) as the second.

17. Although uncited by the circuit courts that have addressed the issue, there is one discussion of the retroactivity of the statute in the legislative history. The question was raised by Rep. George Danielson (who later served as a Justice of the California Court of Appeal) during the testimony of Charles N. Brower, Legal Adviser to the Department of State, and Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice, concerning an earlier version of the bill. *See* Respondent's Appendix A; William H. Manz, *Foreign Sovereign Immunities Act of 1976 with Amendments: A Legislative History of Pub. L. No. 94-583*, Doc. No. 14, *Immunities of Foreign States*, hearing before the Subcommittee on Claims and Governmental Relations, House Judiciary Committee, 93rd Cong. (June 7, 1973), p. 20-21 (2000). Rep. Danielson stated that "my opinion is that [the bill] could have a retroactive effect." Resp. App. A, 1a. Indeed, Rep. Danielson presciently suggested that the bill would be applied to suits concerning Nazi-looted artworks, although he requested that the text be amended to preclude this result. *Id.* at 3a. Nevertheless, the language of the bill remained essentially the same and it was never amended to bar "retroactive" application. Rep. Danielson did not raise his concerns during (Cont'd)

The United States could not have intended, when it announced the new procedures for sovereign immunity determinations, as required under *The Schooner Exchange* and *The Santissima Trinidad*, that foreign sovereigns entering the jurisdiction of United States courts would continue to be afforded sovereign immunity under standards and procedures that had been clearly repudiated by the FSIA.[18]

Petitioners first claimed immunity in this case after Mrs. Altmann filed her complaint in August 2000. Petitioners' claim to immunity was decided under the FSIA based on Petitioners' *current* activities directed toward the United States. Congress expressly directed that such claims to immunity be adjudicated under the rules and procedures set forth in the FSIA,

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subcommittee discussion of the bill in the following Congress on June 2 and 4, 1976. Indeed, on September 29, 1976, Rep. Danielson himself offered the bill on the floor of the House where it passed without dissent. *Manz*, Doc. Nos. 4, 5, 9. That the retroactivity of the statute was recognizes and yet the language of the statute was not amended to preclude retroactivity demonstrates that "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Landgraf*, 511 U.S. at 272-273; *cf. St. Cyr*, 533 U.S. at 320 n.44 (inferring non-retroactivity from fact that "watchdog did not bark in the night"). By contrast, in statutes enacted in foreign countries before and after the FSIA, as the United States points out in its *amicus curiae* brief, the "enactments expressly provide that the exceptions to immunity are not retroactive. . . ." United States Brief at 19 n.14.

18. Indeed, when the FSIA was enacted, the State Department expressly advocated that United States courts should adjudicate prior acts of foreign states, such as the expropriations that followed the Cuban revolution, under principles of international law. *See Alfred Dunhill*, 425 U.S. at 711. In this sense, § 1605(a)(3) can be seen as a companion to the Second Hickenlooper Amendment, Pub. L. 89-171, 79 Stat. 653 (1964), 22 U.S.C. § 2370(e)(2), which eliminated the act of state defense for claims dating back to 1959, when the State Department did not insist on its application.

regardless of when the underlying acts took place. To hold otherwise would be to defeat the entire purpose of the statute, or to redraft it to say

> Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter, *except in cases concerning acts prior to the effective date of this legislation, in which case such claims of foreign states to immunity should be decided* . . . .

Petitioners and their *amici curiae* ask this Court to ignore the clear direction of Congress and to legislate the conclusion to this imaginary statute. A more common sense reading of the FSIA, consistent with this Court's opinion in *Dole Food*, renders such judicial legislation unnecessary.

2. Does The Expropriation Clause Of The FSIA Have An Impermissibly Retroactive Effect?

The second part of the retroactivity question can be analyzed in precisely the same way as the first, by addressing the focus of the FSIA on the present exercise of jurisdiction over the foreign state, rather than upon the prior conduct of the parties.

a. The FSIA Is A Jurisdictional Statute And Therefore Attaches No New Legal Consequences To Prior Events.

The expropriation clause of the FSIA operates here in exactly the fashion deemed non-retroactive in *Hughes*, *i.e.*, by affecting only *where* the suit may be brought, not *whether* it may be brought at all. It does not unsettle the expectations of the parties, nor does it unfairly attach new consequences to actions taking place before its enactment. [19]

19. The Court has previously considered several cases where the restrictive theory of sovereign immunity was applied retrospectively. *First Nat'l City Bank*, 462 U.S. at 619-21 (concerning Cuban (Cont'd)

Petitioners do not, and cannot, suggest that they are now, or have ever been, absolutely immune (*i.e.*, both here *and* in Austria) from Mrs. Altmann's claims. They concede that Mrs. Altmann's claims could now be brought in Austria and indeed have gone so far as to argue that Mrs. Altmann should be required to bring her claims there. Appellant's Opening Brief, dated October 19, 2001 (9th Cir.), p. 49 ("Plainly, Austria is available, adequate, and the more appropriate forum."); Appellant's Reply Brief dated November 5, 2001 (9th Cir.), p. 22 ("Austria is a more favorable forum"). Indeed, the Ninth Circuit found that Petitioners had demonstrated that Austria was an adequate and available forum for this litigation. J. App. 66a-68a. Where a United States citizen such as Mrs. Altmann seeks redress against a foreign state in our courts, a purely jurisdictional statute such as § 1605(a)(3) merely affirms jurisdiction in a domestic forum for litigation which she otherwise would have been forced to bring in the foreign state.[20] This neither unsettles the expectation, nor insults the dignity, of the foreign sovereign.[21] *See National City Bank of New York*, 348 U.S. at 363-64 ("No parochial bias is manifest in our courts which would make

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expropriations in 1960-61); *Verlinden*, 461 U.S. 480 (concerning transactions in 1975); *National City Bank of New York*, 348 U.S. 356 (concerning transactions in 1920 and 1947-48).

20. There is no basis for the suggestion that a party has an "expectation" that United States jurisdictional rules governing international disputes will remain the same and that therefore a statute that confers jurisdiction in the United States unsettles the expectations of the parties that United States courts will not assert jurisdiction. If this were true, then every statute that conferred or ousted jurisdiction would raise retroactivity concerns, which is contrary to this Court's holdings in *Landgraf* and *Hughes*.

21. This is not an argument about waiver of immunity, but rather an argument about retroactivity and the settled expectations of the parties. Retroactivity does not turn on narrow expectations of jurisdictional immunity within a particular forum.

it an affront to the 'power and dignity' of the Republic of China for us to subject it to counterclaims in our courts when it entertains affirmative suits in its own.").

The expropriation clause of the FSIA attaches no "new legal consequences" to the events at issue in this case and alters not one element of any cause of action brought by Mrs. Altmann. The most Petitioners can argue is that the FSIA allows Mrs. Altmann to proceed in the United States, when she might otherwise have been required to proceed in Austria. But this is an argument obviously limited to the question of *where* the case may be brought, not *whether* it may be brought at all. *Hughes,* 520 U.S. at 951. Petitioners have failed to demonstrate an impermissible retroactive effect from the exercise of jurisdiction in this case.

b. The FSIA provides fair notice to sovereign states of their potential liability for withholding property taken in violation of international law.

As explained above, sovereign immunity has always been premised on an implied waiver of United States sovereignty for foreign states coming within the jurisdiction of our courts. From the very beginning, it was held that this implied waiver could be revoked by an express statute. *The Schooner Exchange,*11 U.S. at 146; *The Santissima Trinidad,* 20 U.S. at 353. The FSIA is on its face such a statute. When it was enacted, it provided undeniably clear notice to all foreign states that "henceforth" their claims to immunity would be adjudicated under the terms of the statute, and not under the prior regime of deference to State Department suggestions under a common law standard. 28 U.S.C. § 1602. There is no evidence that at the time of the enactment of the FSIA the United States or any foreign state understood the Act to preserve any common law claims to sovereign immunity for causes of action concerning events that pre-dated its effective date.

Thus, with the enactment of the FSIA, every foreign state was on notice that the United States would not afford sovereign immunity where rights in property taken in violation of international law are at issue. From that point, every foreign state knew that if it sent expropriated property into the United States, or entrusted it to an agency engaged in a commercial activity in the United States, its rights to ownership of that property could be adjudicated by a United States court under § 1605(a)(3).

This suit was brought twenty-three years after the effective date of the FSIA based on jurisdictional contacts by Petitioners occurring in the year 2000. Specifically, Mrs. Altmann alleged, and the Ninth Circuit found, that the paintings at issue were owned or operated by the Austrian Gallery, an agency or instrumentality of the Republic of Austria that was engaged in a commercial activity in the United States, *e.g.* advertising exhibitions and selling books featuring the looted paintings at issue. Petitioners do not claim that they were unaware of the terms of the FSIA, or that they did not receive fair notice of its provisions, when they engaged in the recent activities which formed the basis for the jurisdictional contacts found to exist by the lower courts in this case. Applying a twenty-three-year-old statute to determine jurisdiction in no way violates Petitioners' expectation of fair notice. That notice was given in 1976.

c. Petitioners did not rely on immunity.

Petitioners could never have relied on immunity from Mrs. Altmann's claims — not at the time of the initial expropriations and certainly not now. Austria was an occupied country during World War II. Immediately after its liberation by the Allies, Austria began enacting legislation designed to permit claims by persons whose property had been confiscated under the discriminatory laws imposed by the Nazis. The first three of the new laws allowed claims against the Republic of Austria for property such as the paintings at issue in this case.

Therefore, Petitioners never had any basis for believing they would be immune from the claims asserted by Mrs. Altmann for recovery of her uncle's paintings. Indeed, as the Ninth Circuit noted, liability in civil actions for such claims is anticipated under the Hague Convention of 1907, as well as under the Austrian State Treaty of 1955. The London Declarations and Moscow Declarations also warned Petitioners of their obligation to return looted artworks.

Further, there is simply no evidence that Petitioners ever relied on immunity in this case. Petitioners presented no evidence that they relied on sovereign immunity in the United States when they undertook the relevant jurisdictional acts (advertising exhibitions and selling books and tickets). They cannot point to any statement by the United States government that led them to believe in the year 2000 that the FSIA did not apply to new claims concerning World War II era expropriations. Indeed, after Mrs. Altmann filed suit in August 2000, Austria and the United States negotiated a settlement of various such claims asserted in class actions, but *expressly exempted and preserved* claims for looted artworks from the "legal closure" provision of the resulting executive agreement. Opp. App. A, 3a. *At no time* during the negotiation of the executive agreement, in which Mrs. Altmann's counsel participated, did the United States indicate to Austria that it was immune for claims concerning looted artworks. Indeed, at the insistence of Mrs. Altmann's counsel, the United States requested and obtained a letter from Austria's Ambassador confirming that Mrs. Altmann's pending case would not be affected by the agreement. J. App. L, 243a. Austria referred to Mrs. Altmann's pending case as "a matter of art restitution under the Austrian law." *Id.* There is and was simply no evidence that Austria was relying on any representation of immunity at that time.

d. Petitioners had no settled expectation of immunity.

There can be no recognizable *expectation* of immunity for acts that violate long-standing, pre-existing obligations. In *Alabama*, 362 U.S. 602, a new statute authorizing voting rights claims against a State under the Fifteenth Amendment was applied to permit suits based on acts predating the enactment, even though there was no express statement supporting retroactivity in the new law. The State was not permitted to argue that it had a settled expectation of immunity based on the prior law because the new law merely conferred jurisdiction over claims that were already authorized by the Fifteenth Amendment when the underlying acts took place. The FSIA operates in precisely the same way in this case.

Mrs. Altmann's claims are based on Petitioners' unlawful withholding of looted artworks, in violation of the Hague Convention of 1907, the Austrian State Treaty of 1955 and various Austrian restitution laws prohibiting such acts. Petitioners never could have had any expectation of immunity from suit for those illegal acts. Like the Civil Rights Act of 1960, the FSIA merely confers jurisdiction in federal court for claims that already existed and were supported under prior law.

This essential fact distinguishes the Court's holding in *Hughes*. In that case, the *qui tam* relator had no claim at all against the defendant until after the statute was amended. The new statute essentially created a claim for the relator to bring based on events that occurred prior to the enactment. By contrast, the FSIA does not create Mrs. Altmann's claim against Petitioners. The potential for her claims existed (inchoately, because she was unaware of them[22]) long before the FSIA was

22. The claims accrued only in 1999 when Mrs. Altmann first learned that she and her family's attorney had been deceived by the post-War Austrian government. Cal. Code Civ. P. § 338(d) (cause of action on the grounds of fraud or mistake does not accrue until the (Cont'd)

enacted.[23] To paraphrase *Bruner v. United States*, 343 U.S. 112 (1952), a case concerning a statute that removed jurisdiction over a claim, "Congress has not altered the nature of [Mrs. Altmann's] rights or [Austria's] liability but has simply [increased] the number of tribunals authorized to hear and determine such rights and liabilities."[24] *Bruner* at 117.

Petitioners' argument is also premised on the theory that the FSIA materially altered the law of sovereign immunity in suits over expropriated property. As demonstrated above, that argument is historically unsound.

First, Petitioners, without explanation, completely ignore the holding of Justice Story in *The Santissima Trinidad*, a case in which the Court permitted a suit against a foreign state concerning prize property on a seized ship. The artworks at issue

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discovery of the facts constituting the fraud or mistake). The statute of limitations for actions such as this one runs from the discovery of the fraud committed on the plaintiff. Cal. Code Civ. P. § 338(d); *see Strasberg v. Odyssey Group, Inc.*, 51 Cal.App.4th 906, 915-18, 59 Cal.Rtpr.2d 474 (1996) (statute of limitations in action for conversion was tolled until fraud was discovered). Austria apparently has a similar rule. J. App. M, 245a.

23. The sole exception to this is Mrs. Altmann's claim for return of the painting *Amalie Zuckerkandl*. That painting was not donated to the Austrian Gallery until 1988 (and not delivered until the death of Vita Künstler in 2001). The application of the FSIA to this particular claim against Respondents, which did not even exist until 1988 at the earliest, cannot possibly be considered "retroactive."

24. Prof. Lowenfeld, in his *amicus curiae* brief for Societé Nationale des Chemins de Fer Français, argues essentially in favor of Mrs. Altmann's position on the retroactivity question, but then, as a hedge, suggests that the Court might make a distinction between jurisdiction-ousting and jurisdiction-conferring statutes. SNCF, p. 7. There is no legal basis for this distinction, which would require the Court to overrule *Andrus* and *Alabama* and disregard all of the Court's prior statements confirming the permissibility of applying statutes that confer jurisdiction to all pending cases.

in this case are certainly more similar to that prize cargo than to a ship of war and its armaments (over which Justice Story would have accepted an immunity claim). Were the paintings in this country, and the case brought under the first prong of § 1605(a)(3), one would be hard-pressed to distinguish Justice Story's opinion from the facts of this case. The same result should hold for a case brought under the second prong of § 1605(a)(3). The Ninth Circuit held as much when it found there could be no expectation of immunity for Mrs. Altmann's claims.

Second, Petitioners ignore the fact that the doctrine of sovereign immunity is a common law doctrine. Therefore, more recent pronouncements by the Court *ipso facto* have retroactive application.[25] *Harper*, 509 U.S. at 97-98. Petitioners have presented no evidence or argument that the FSIA differs from the common law of sovereign immunity *as it was understood in 1976 or as it is understood today*. Prior to the FSIA, this Court's most recent pronouncement on sovereign immunity was *Alfred Dunhill*, in which a plurality of four justices led by Justice White held, relying on the restrictive doctrine of sovereign immunity, that the act of state doctrine would not bar a United States court from adjudicating an offset claim against the Republic of Cuba concerning commercial property expropriated by the Cuban government in 1960.[26] As Justice White explained:

> It cannot be gainsaid, however, that the proper application of each [of the act of state and sovereign

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25. An act of Congress supersedes an earlier rule of international law if that is the clear purpose of the statute. *The Paqueta Habana*, 175 U.S. 677, 700 (1900); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1813) (Marshall, C.J.); Restatement of Foreign Relations Law (Third), § 115(1)(a) (1989).

26. The act of state doctrine itself only applies in the absence of a treaty upon which to judge the acts of the foreign state. *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).
(Cont'd)

> immunity doctrines] involves a balancing of the injury to our foreign policy, the conduct of which is committed primarily to the Executive Branch, through judicial affronts to sovereign powers . . . against the injury to the private party, who is denied justice through judicial deference to a raw assertion of sovereignty, and a consequent injury to international trade. The State Department has concluded that in the commercial area the need for merchants "to have their rights determined in courts" outweighs any injury to foreign policy. This conclusion was reached in the context of the jurisdictional problem of sovereign immunity. We reach the same one in the choice-of-law context of the act of state doctrine.

Alfred Dunhill, 425 U.S. at 706 n.18. Justice Powell, concurring with the plurality opinion of Justice White, took an even more expansive approach, stating, as he had in *First Nat. City Bank*, that "Unless it appears that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches, I conclude that federal courts have an obligation to

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(Cont'd)

The concern in *Sabbatino* was that it would be unwise for courts to judge the acts of countries where there is not even a basic agreement on the fundamental principles of law to be applied. When there is a treaty governing the act, and no dispute over the applicable law, this rationale for abstention under the act of state doctrine evaporates. Petitioners withdrew from their motion to dismiss any assertion of the act of state defense, and therefore this defense has not been litigated in this case. In any event, under *Sabbatino*, the defense could hardly succeed here, since the claims at issue are clearly covered by the Austrian State Treaty of 1955 and the Hague Convention of 1907, and therefore there would be no grounds for the court to decline to hear the case under the act of state doctrine. Also militating strongly against an act of state defense is the State Department's pronouncement in *Bernstein*, repeated in its statement in *Alfred Dunhill*, that the act of state doctrine need not apply to cases involving Nazi confiscations. *Alfred Dunhill*, 425 U.S. at 708.

hear cases such as this." *Alfred Dunhill*, 425 U.S. at 775-776 (Powell, J., concurring).

Therefore, the federal common law of sovereign immunity in 1976, prior to the enactment of the FSIA, permitted suits against foreign states concerning private, commercial property taken in violation of international law. *See also Alfred Dunhill*, 425 U.S. at 710 n.2 (November 26, 1975 letter of Monroe Leigh, Legal Adviser to State Department, identifying foreign law decisions rejecting sovereign immunity and act of state defenses in cases concerning expropriated property). As a statement of the common law, this rule applied to all suits no matter when the underlying acts took place. And as Justice White noted, citing Chief Justice Marshall's opinion in *Planter's Bank of Georgia*, "[d]istinguishing between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach." *Alfred Dunhill*, 425 U.S. at 685. Therefore, the suggestion that the FSIA altered the law or is impermissibly retroactive when applied to claims relating to underlying events predating its enactment (or the Tate Letter of 1952) is simply unfounded. The FSIA merely codified the existing state of the common law; its application to claims concerning underlying facts prior to its effective date has no impermissibly retroactive effect.

Indeed, as noted in the *Alfred Dunhill*, Austria itself long ago abandoned the notion of absolute immunity. *Alfred Dunhill*, 425 U.S. at 702 n.15, citing *Collission with Foreign Government-Owned Motor Car (Austria) Case*, 40 Int'l L. Rep. 73 (Sup. Ct. of Austria 1961). The history of this development is explained in the influential case of *Dralle v. Republic of Czechoslovakia*, 17 Int'l.L.Rep. 155 (Sup. Ct. of Austria 1950). In *Dralle* a German company filed suit in Austria against the Republic of Czechoslovakia over trademarks that had belonged to a nationalized Czech subsidiary of the German company. The Austrian Supreme Court held that the defense of sovereign

immunity could not be asserted because the case concerned the commercial activities of a foreign state and not its political activities.[27]

As it is applied in this case, § 1605(a)(3) of the FSIA is consistent with the common law approach and does not present a marked departure from the common law rule identified in *Alfred Dunhill*. This case does not concern the "public and governmental acts" of a sovereign state. Hoarding paintings that were purchased by private collectors is not an act integrally related to the functioning of a government. It is more akin to a commercial activity, and indeed it is now commonplace (both in the United States and in Austria) for private individuals and foundations to operate museums. This case has no bearing on the essential functions of the Austrian government; it will not interfere with the government's exercise of military or police functions, its regulation of industry, or the collection of taxes. This case concerns privately collected paintings hanging on a private citizen's wall — specifically, paintings which until 1938 hung on the wall of Mrs. Altmann's uncle's home in Vienna and which have been withheld from his niece and heir in violation of principles of international law set forth in treaties dating back almost one hundred years. Under the common law of sovereign immunity as it is understood today, Mrs. Altmann's claims would be allowed to proceed.

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27. Indeed, Austria's leading commentator on public international law issues of sovereign immunity and confiscation, Ignaz Seidl-Hohenveldern, opined in 1962 that although public international law does not necessarily command the recognition of claims for expropriated property, *it also does not forbid them, and the weightier arguments of the public order speak in favor of the recognition of such claims*. Seidl-Hohenveldern, 56 American Journal of Int'l L. 509 (1962) ("The writer has stated more than once, that he very strongly rejects the view that a state would violate international law if its courts permitted an owner to recover an object of which he had been dispossessed by an act of state of the situs of the property.").

B. No Foreign Policy Interests Are Actually At Stake In This Litigation.

Mrs. Altmann's case raises absolutely no substantial foreign policy issues. In contrast to probably all other World War II-era cases being litigated at this time, the United States has *not* filed a statement of interest in this case because this case does not, by itself, implicate any foreign policy objectives of the United States. To the contrary, Mrs. Altmann's position here is consistent with the United States' true position that Nazi-looted artworks should be returned to their original owners. *See United States v. Portrait of Wally*, 2002 U.S. Dist Lexis 6445 (action brought by United States to forfeit Nazi-looted painting on loan from a publicly funded and government-controlled Austrian museum); Opp. App. D — Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 18 (1998).[28] Nor does this case conflict with any existing executive agreement or treaty between the United States and Austria. *See Multilateral Austrian State Treaty*, TIAS 3298; 6 U.S.T. 2369; 1955 U.S.T. Lexis 35 (May 15, 1955); Opp. App. C — Austrian State Treaty of 1955, Article 26.

Because the FSIA arguably precludes them from doing so, the State Department long ago stopped issuing suggestions of immunity on behalf of foreign states, and it has not issued one here. *See* 75 Dept. of State Bull. 649 (1976) ("The Department of State will not make any sovereign immunity determinations after the effective date of [the FSIA]. Indeed, it would be inconsistent with the legislative intent of that Act for the Executive Branch to file any suggestion of immunity on or after

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28. *See also* Stuart Eizenstat, *In Support of Principles on Nazi-Confiscated Art*, December 3, 1998, at http://www.state.gov/www/policy_remarks/1998/981203_eizenstat_heac_art.html; "Plunder and Restitution: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report," December 2000, at http://www.pcha.gov/PlunderRestitution.html/html/Home_Contents.html; Washington Conference on Holocaust-Era Assets (1988), http://fcit.coedu.usf.edu/holocaust/resource/assets/heac2.pdf.

January 19, 1977."). Consistent with this approach, during the negotiation of the recent executive agreement, the United States informed Austria that it would not file a statement of interest in this case. J. App. L, 243a. Therefore, the United States has not taken the position that this lawsuit will interfere with the foreign policy objectives of the Executive Branch.

The degree of deference normally accorded to the views of the United States in cases involving foreign governments should not be afforded here. The United States' role as *amicus curiae* merely reflects the government's views as to statutory construction of the FSIA. The United States has not made any stronger suggestion that this particular case interferes with the foreign policy of the United States, as it has in other cases. Rather, its concern is for these other, unrelated cases, which it fears might be permitted to proceed if Mrs. Altmann's jurisdictional position is affirmed.

The United States concludes, without any evidence or even an attempt at justification, that the jurisdiction ruling of the Ninth Circuit "may have serious consequences for the United States' conduct of its foreign relations, including reciprocal treatment of the United States in foreign courts."[29] The United States apparently believes that this vague pronouncement is sufficient to outweigh Mrs. Altmann's rights to have her case heard on the merits under the FSIA.

What exactly are the "serious consequences" that the United States fears from this case? It is disingenuous for the Petitioners

29. Underscoring the wisdom of the FSIA in excluding the Executive Branch from these types of determinations, it should be noted that the State Department came to the exactly opposite conclusion in the *Alfred Dunhill* case. *Alfred Dunhill*, 425 U.S. at 711 (quoting letter of Monroe Leigh, Legal Adviser to the State Department to the Solicitor General, dated November 26, 1975, which concluded "In general this Department's experience provides little support for a presumption that adjudication of acts of foreign states in accordance with relevant principles of international law would embarrass the conduct of foreign policy.").

and their *amici* to argue that this case will "open the floodgates" of litigation against other states over acts that occurred during World War II. The several pending cases mentioned raise a host of other, potentially dispositive, issues not present here.[30] The defendants in those cases,[31] supported by statements of interest filed by the United States, have raised numerous defenses, not the least of which is the purported interference by those actions with various executive agreements and treaties, an argument that cannot be made in this case. Notably, this Court's decision in *Am. Ins. Ass'n v. Garamendi*, __ U.S. __, 156 L. Ed. 2d 376, 2003 U.S. LEXIS 4797 (June 23, 2003), has no bearing on this case because the United States and Austria have agreed that Mrs. Altmann's claims do not affect any executive agreement or treaty. J. App. L, 243a; *see also* footnote 7, *supra*. There has never been any attempt to reach a diplomatic settlement of individual looted art claims, and indeed such claims were expressly preserved in the recent executive agreement.[32] Opp. App. A, 2a-3a.

This case presents a complex combination of somewhat unique facts and legal issues that is *sui generis* and not likely to be repeated in other cases. Mrs. Altmann should not be required to argue against unknown results in quite different actions. Indeed, on April 15, 2003, Judge Florence Marie Cooper (the same district court judge who affirmed jurisdiction in this case)

30. It appears that most of the pending class actions (for example the ones asserted against Japan and Mexico) allege jurisdiction under the commercial activity exception, § 1605(a)(2), rather than under § 1605(a)(3)).

31. Most of the cases also concern non-sovereign defendants, so that issues involved there will likely be litigated regardless of the success or failure of the sovereign immunity defense.

32. The express exclusion and preservation of individual claims for looted artworks from the recent executive agreement, made with knowledge of Mrs. Altmann's then-pending action, precludes any assertion that the United States has reserved its interest in exercising diplomatic efforts to settle these particular claims.

dismissed a class action suit asserting World War II-era commercial activity and expropriation claims against Austria on the grounds of the executive's foreign policy power under the political question doctrine. *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098 (C.D.Cal. April 15, 2003). Judge Cooper's rationale was identical to this Court's reasoning in *Garamendi*: that in the face of a statement of interest by the United States Government asserting that the maintenance of a class action would interfere with an executive agreement between the United States and Austria, the Court could only conclude that the suit would impermissibly interfere with the foreign relations power of the executive branch. *Id.* It therefore appears highly unlikely that the hypothetical results feared by Petitioners and their *amici* will occur. *See also Roeder v. Islamic Republic of Iran*, 333 F.3d 228 (D.C. Cir. 2003) (executive agreement preempts claims against Iran); *Deutsch v. Turner Corp.*, 317 F.3d 1005, *rehearing denied and opinion amended* 324 F.3d 692 (9th Cir. 2003) (executive agreements and treaties bar various World War II claims); *Cruz v. United States*, 2003 U.S. Dist. LEXIS 10948 (N.D.Cal. 2003) (denying reconsideration of ruling dismissing a class action lawsuit against Mexico on sovereign immunity grounds); *Duveen v. United States Dist. Ct (In re Austrian and German Holocaust Litig.)*, 250 F.3d 156 (2d Cir. 2001) (compelling dismissal of class action against German banks on comity grounds); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing slave labor claims against Germany); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (same).

In sum, the parade of alleged horribles suggested by Petitioners and their *amici curiae* has not, and will not, come to pass. Mrs. Altmann's claims are unique, and the legal holding here will not control cases where other issues are before the judiciary and other defenses are available.

CONCLUSION

For all the foregoing reasons, Mrs. Altmann respectfully requests that this Court find that the FSIA does not operate retroactively, and that in particular it has no impermissibly retroactive effect on the rights and remedies of the parties to this action. The Court should therefore affirm jurisdiction in this case. This is the only result that will allow Mrs. Altmann to proceed with her claims on their merits so that they can be resolved during her lifetime.

Respectfully submitted,

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APPENDIX

Hearing before the Subcommittee on Claims and Governmental Relations, House Judiciary Committee, 93rd Cong. (June 7, 1973) on H.R. 3493. Testimony of Charles N. Brower, Acting Legal Adviser, Department of State and Bruno Ristau, Foreign Litigation Unit, Civil Division, Department of Justice

MR. DANIELSON. This exception here on nationalized or expropriated property gives rise to a host of implications. This bill, as I understand it, would be to recognize the right of our courts to have jurisdiction over a foreign state under certain circumstances; therefore, it is procedural in nature, rather than substantive in nature, and my opinion is that it could have a retroactive effect. It would simply allow the litigant to come into court, which he is presently barred from doing.

Let's take the, oh, the Baltic States: Lithuania, Latvia, Estonia, within which many properties were expropriated and nationalized way back at the time of World War II. Your language here says: "Any property exchanged for such property," so let's assume that a person who was a national of Lithuania, and who had property in Lithuania was expropriated and nationalized by the powers which took over Lithuania in 1939 or 1940 or 1941 — whenever it was and these properties have now been exchanged for some properties which are here. Would the former Lithuania be able to bring an action in our American courts against the Soviet Union — I presume it would be — for the properties which are now resident here in the United States?

MR. RISTAU. Congressman, the important question is, the entity which presently has custody over the property, is it engaged in trade with that property in the United States? In other words, are they trading?

MR. DANIELSON. This ties back to the commercial nature?

MR. RISTAU. Are they engaged in commerce in the United States with respect to that particular property? Yes.

MR. BROWER. Under the statute either of several things need to apply, and you mentioned one; that it has to be present in the United States in connection with a commercial activity carried on in the United States by the foreign state and that means —

MR. DANIELSON. Wait. How about a ship, a steamship, for example, which is now in New York Harbor with a cargo of something?

MR. BROWER. I think your question illustrates the complexities of this area of the law, because you are now getting into the maritime area.

MR. DANIELSON. Well, it brought over a cargo of railroad cars for instance, and those railroad cars are now present in New Jersey. That is no longer maritime, the cargo is now on land.

MR. BROWER. Okay.

MR. DANIELSON. I am going to make a suggestion. I think if we are going to have a law like this, we better provide that it is not retroactive, because this could open up a can of worms that you will never be able to close.

MR. BROWER. Well, I think that is a problem. You are right. I think that certainly in many cases, the passage of a period of time as long as 30 years or more could certainly raise questions as to whether the property present in a country, was, in fact, transferred or exchanged.

MR. DANIELSON. What about a work of art? It may exist hundreds of years. Hitler confiscated and nationalized unknown quantities of valuable artwork and some of them have shown up elsewhere. I mean, this is not just imagination, you know; it is real.

MR. BROWER. No; I understand that. I think that is a real point because if, as we intend, one of the principal objects of the statute is to avoid undue foreign relations problems, then we want to be sure it is so drafted as to not raise new foreign relations problems. You put your finger on that one that I think is particularly noteworthy. It is a concept, perhaps, behind the statute of limitations as well.

MR. DANIELSON. I think most of our courts provide, however, that where a statute of limitations is tolled, where the proposed litigant is barred from asserting his remedy, due to a procedural problem —

MR. BROWER. I see your point. I think we should explore it.

MR. DANIELSON. I think we should simply provide that it not be retroactive and solve the whole problem.

MR. BROWER. I think that is very true since the effect of a statute in this particular case is, in fact, not only procedural but substantive to some extent. I think we do need to be particularly careful on how it is drafted.

Supreme Court, U.S.
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No. 03-13

IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION

Essentially abandoning the Ninth Circuit's grounds for concluding that United States courts have jurisdiction over this action, Respondent ("Altmann") sets yet another course. Altmann has fashioned discordant legal theories expressly rejected by this Court in holdings that she strains to distinguish or references with only the slightest regard for their controlling authority. The entire thrust of her brief is to avoid having the presumption against retrospective application of Congressional enactments apply to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA"), on the unfounded assumption that retroactivity must have been what Congress intended in adopting the statute. *Landgraf v. USI Film Products, Inc.*, 511 U.S. 244 (1994), and its progeny, as well as accepted rules of statutory construction and the FSIA's legislative history, stand firmly against that effort.

I. ALTMANN'S REASONS FOR DEPARTING FROM *LANDGRAF* ARE UNPRECEDENTED AND ILL-CONCEIVED.

1. Altmann's basis for asserting that the FSIA should be presumed to apply retrospectively has been rejected by this Court. Altmann's argument (at 10) that the FSIA, unlike other statutes, is presumptively *retrospective* because it "replaced an earlier federal common law doctrine rather than an earlier statute," conflicts with *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), which was argued with *Landgraf*. Even a statute intended to restate or restore a rule of law cannot be applied retrospectively unless it overcomes the presumption favoring the prospective application of statutes enunciated in *Landgraf*. *Rivers*, 511 U.S. at 313. In so holding, *Rivers* observed that "'[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.'" *Id.* at 311-312 (citation omitted). Ignoring *Rivers*, Altmann cites to *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), a case having nothing to do with the presumption favoring the prospective application of statutes.

Harper confirms that rules of law enunciated by this Court are applied to all cases pending at the time the rule is announced. *Harper*, 509 U.S. at 97-98. *Harper* does not support – and *Rivers* refutes – Altmann's argument (at 10-11) that the FSIA is presumed to apply retrospectively because it purportedly codifies the federal common law of foreign sovereign immunity.

Notably, *Rivers* held that the statute before it, lacking a clear Congressional statement of retrospective application, had an impermissibly retroactive effect "because it creates liabilities that had no legal existence before the Act was passed." *Rivers*, 511 U.S. at 313. In this regard, Altmann's faulty analysis is compounded by her false premise that the FSIA merely codified the common law and did not create new liabilities for foreign states. The "common law" before the FSIA was that foreign states were entitled to absolute immunity at least until 1952, *Berizzi Bros. Co. v. Pesaro*, 271 U.S. 562 (1926); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); and that expropriations by foreign states of property within their own territory were public acts for which they were immune until the FSIA's enactment in 1976. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 353, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 394 (1965).[1]

1. This Court did not, as Altmann asserts (at 22), "return to the restrictive theory of sovereign immunity" in *Compania Espanola de Navigacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); and *National City Bank of New York v. Republic of China*, 348 U.S. 356 (1955). The earliest acknowledgement by the Court of the restrictive theory as "prevailing law" in the United States was in 1976, in reliance on *post-1952* lower court decisions. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703 (1976). Nor, as Altmann asserts (at 20-21), did the Court for 150 years overlook a commercial exception in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812) or forget about *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822). To the contrary, the argument that a commercial activity exception can be found in *The Schooner Exchange* was expressly rejected – *over seventy years ago* – in *Berrizi Bros.*, 271 U.S. at 574. And, contrary to Altmann's (Cont'd)

The FSIA departed from the "common law" of foreign sovereign immunity when it enacted the expropriation exception in section 1605(a)(3). *See* Brief for Petitioners, 15-21. Altmann's contention (at 39) to the contrary misreads the only authority it relies upon – *Alfred Dunhill*, a case that did not concern sovereign immunity but, rather, whether the act of state doctrine was a viable defense to a claim for repudiation of a commercial debt. Even so, *Alfred Dunhill* expressly noted that its holding concerning commercial activity *did not apply to* "expropriations of foreign assets located *ab initio* inside a country's territorial borders." *Alfred Dunhill*, 425 U.S. at 697 n. 11.

2. The FSIA is not a forum-allocating statute, as Altmann asserts. Altmann's contention (at 13-14, 30-32) that the FSIA "merely allocate[s] jurisdiction" and addresses "only *where* the suit may be brought, not *whether* a suit may be brought at all," misconstrues this Court's analysis in *Hughes Aircraft Co. v. United States ex rel Schumer*, 520 U.S. 939 (1997), disregards the substantive nature of foreign sovereign immunity in the United States and overlooks the express limitations of the FSIA.

Hughes Aircraft rejected the argument advanced by Altmann that jurisdiction-altering statutes are not subject to the presumption against retrospective application. *Hughes Aircraft*, 520 U.S. at 950 ("the only 'presumption' mentioned in [*Landgraf*] is a general presumption *against* retroactivity"). The FSIA speaks not only to the availability of the United States as a forum, as Altmann asserts, but also regulates the substantive immunity of foreign sovereigns and, hence, what claims are available against them in the United States. In *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480 (1983), this Court confirmed that the immunity provisions of the FSIA constitute a comprehensive statement of *substantive*, not merely

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assertions (at 17-23), *The Santissima Trinidad* is inapplicable, as it concerned the preservation of United States neutrality in an *in rem* dispute between *two foreign states* over a prize of war brought *to the United States*. *See The Steamship Appam*, 243 U.S. 124, 153-156 (1917).

procedural, federal law. *Verlinden*, 461 U.S. at 493 ("a suit against a foreign state under [the FSIA] necessarily raises questions of substantive federal law at the very outset"). That the FSIA codifies *whether* a suit may be brought in the United States is evident from its text, which confirms that foreign states are presumed to be immune from suit in the United States *unless* one of the statutory exceptions to immunity is established. 28 U.S.C. § 1604; *Verlinden*, 461 U.S. at 488-489. *See also Gates v. Victor Fine Foods*, 54 F.3d 1457, 1463 (9th Cir.), *cert. denied*, 516 U.S. 869 (1995) (plaintiffs bear the initial burden of establishing a statutory exception to immunity).

Had Congress intended to subject all foreign states to United States jurisdiction for every claim for which they could be sued in their own courts – or, indeed, *constrain* the FSIA only to such claims – it would have expressly so provided in the statute. Instead, Congress prescribed jurisdiction over those claims "to which the foreign state is not entitled to immunity under [the FSIA] or any applicable international agreement," 28 U.S.C. § 1330, thus confirming that the FSIA does not merely "speak to the power of the court" to hear claims against foreign states, but also "speaks to the rights and obligations of the parties" in such actions. *Hughes Aircraft*, 520 U.S. at 951 (quoting *Landgraf*, 511 U.S. at 274).

Even if, as Altmann assumes, certain foreign states have waived immunity in their own countries for some causes of action, their substantive immunity in the United States is unaffected. It is well-settled that "'submission of a foreign sovereign to its own courts . . . does not by itself evidence an intent by the foreign sovereign to waive its immunity from suit in the United States.'" *Corzo v. Banco Central De Reserva Del Peru*, 243 F.3d 519, 523 (9th Cir. 2001) (favorably quoting the district court) (citations to other circuit courts in accord omitted). *Cf. Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984) (a State does not waive

Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own courts).[2]

There also is no merit to Altmann's contention (at 25) that *Landgraf* is inapplicable because, she asserts, "the FSIA concerns claims to immunity, and not the underlying claim for relief." *Hughes Aircraft* also held that a statute that eliminates a defense previously available to a class of defendants "essentially creates a new cause of action," and would have an impermissible retroactive effect if applied to pre-enactment events, "even though phrased in 'jurisdictional' terms." 520 U.S. at 950-951. *See Abrams v. Société Nationale Des Chemins De Fer Français*, 332 F.3d 173, 183-185 (2d Cir. 2003) (retrospective application of the FSIA "cannot be reconciled with the Supreme Court's discussion of jurisdiction-allocating statutes in *Landgraf* and, more recently, in *Hughes Aircraft*"); *Hwang Geum Joo v. Japan*, 332 F.3d 679, 684 (D.C. Cir. 2003) (the FSIA "'creates jurisdiction where none previously existed' and therefore affects the substantive rights of the concerned parties'") (quoting *Hughes Aircraft*, 520 U.S. at 951).[3]

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2. Altmann's attempt (at 31 n. 21) to characterize her approach as one of retroactivity, and not of waiver, is misleading, as the effect is the same – foreign states would be subjected to United States jurisdiction merely because they chose to waive immunity in their own courts.

3. Altmann's reliance (at 14, 35) on *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978), and *United States v. Alabama*, 362 U.S. 602 (1960), which she concedes (at 14) involved statutes that "did not alter the pre-existing rights of the parties," is misplaced. *Andrus* held that a statute eliminating the amount-in-controversy requirement for suits against United States agencies could be applied to a pending administrative appeal because prior Congressional intent to permit such suits was undisputed. *Andrus*, 436 U.S. at 608 n. 6, citing to *Ralpho v. Bell*, 569 F.2d 607, 615-616 n. 51 (1977). *See also Califano v. Sanders*, 430 U.S. 99, 101 n. 7 (1977). *Alabama* involved no substantive change in law. The Court merely applied a provision of the 1960 Civil

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II. ALTMANN'S RESPONSE DISTORTS THE TEXT AND PURPOSE OF THE FSIA.

Altmann's interpretation of the FSIA as containing the requisite Congressional direction for retrospective application is contrary to accepted rules of statutory construction.

1. Altmann's interpretation of the FSIA's preamble does not satisfy Landgraf's clear-statement requirement. *Landgraf* demands an expression of retrospective intent by Congress "so clear it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 329 n. 4 (1997). Altmann argues (at 25) that the phrase "henceforth decided" in the last sentence of the FSIA's preamble, 28 U.S.C. § 1602, mandates that the statute apply to every action commenced after 1976, even if it arises from events that occurred decades previously.

Whether that language is susceptible of Altmann's interpretation is not legally significant. Because Altmann's reading, not a very compelling one, is at best one of several possible interpretations, the *Landgraf* presumption controls. The last sentence in section 1602 on which she relies –

> Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter

– makes no clear statement that the FSIA applies to all actions commenced on or after the date of enactment. It is at most ambiguous and can be (and repeatedly has been) read instead to

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Rights Act that closed a gap in federal jurisdiction over States under pre-existing law, permitting suits against States in their own names which had previously been litigated under *Ex Parte Young*, 209 U.S. 123 (1908). *Alabama*, 362 U.S. at 604. The civil rights statutes also were injunctive in nature and, as such, applied prospectively under different principles than *Landgraf*. *Id.*, citing to *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921).

apply only to claims *arising after* the effective date. *Hwang Geum Joo*, 332 F.3d at 686 ("[t]he preambular sentence falls far short . . . of stating the 'clear intent' of the Congress that the statute be applied retroactively to events occurring before 1952"); *Abrams*, 332 F.3d at 184 ("[t]he use of the word 'henceforth' can reasonably sustain more than one construction," including prospective intent); *Jackson v. People's Republic of China,* 794 F.2d 1490, 1497 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987) (noting with approval the district court's holding that the language of the preamble "appeared to be prospective").

That Altmann's construction fails to meet *Landgraf*'s "clear statement" standard is obvious and, on this basis, alone, must be rejected. Her construction also is undermined by the FSIA's legislative history, which indicates that the function of the last sentence was to reflect Congress' intent that determination of sovereign immunity claims should henceforth be decided by the courts, rather than by the Executive Branch, *not* to direct any retrospective application of the FSIA to pre-enactment conduct. *Hwang Geum Joo,* 332 F.3d at 686; S. Rep. No. 94-1310, 94th Cong., 2d Session (1976) ("S. Rep.") at 14, *reprinted in* 5 U.S. Code Cong. & Ad. News (1976) 6604, 6613 (the FSIA "sets forth the legal standards under which Federal and State *courts* would henceforth determine all claims of sovereign immunity") (emphasis added). *See also Verlinden,* 461 U.S. at 488.

2. The FSIA regulates post-enactment expropriations by foreign states, not their current possession of property previously expropriated. Dodging the absence of any clear statement by Congress that the FSIA apply retrospectively, Altmann acknowledges (at 24-26, 29) that section 1605(a)(3) focuses on and regulates only "current activities directed toward the United States," but asserts that the regulated conduct is the wrongful current *possession* by foreign states of expropriated property, not their *takings* in violation of international law. Altmann's argument – that what Congress, commentators, and courts have uniformly called the "*expropriation* exception"

applies to foreign states that presently *possess* property taken in violation of international law, no matter when the taking occurred, or by whom – disregards the rudimentary rule of statutory construction that "courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part." *Branch v. Smith*, 538 U.S. 254, __, 123 S. Ct. 1429, 1445 (2003). *See also Lindh*, 521 U.S. at 326 (absent a clear statement by Congress, normal rules of statutory construction should be used to determine whether the statute has an impermissible retroactive effect).[4]

Altmann's argument fails because (a) her construction is contrary to the intent of Congress and the Executive Branch that section 1605(a)(3) applies only to post-enactment takings; (b) the structure of the FSIA, and the plain language of another identically structured immunity exception, are at odds with Altmann's interpretation of the expropriation exception; and (c) Altmann's construction would lead to absurd consequences that could not have been intended by Congress when the FSIA was enacted.

This Court recognized in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), that "Congress had violations of international law by foreign states in mind when it enacted the FSIA. *For example, the FSIA specifically denies foreign states immunity in suits 'in which rights in property taken in violation of international law are in issue.'*" *Amerada Hess*, 488 U.S. at 435 (quoting section 1605(a)(3)) (emphasis added). Indeed, the constitutional basis for the FSIA was, in

4. Altmann's assertion that the expropriation exception also regulates foreign states' commercial activity in the United States *vis-à-vis* the "taken" property (at 33) is unfounded. The commercial activity language identifies the nexus necessary to support the assertion of jurisdiction and is therefore entirely distinct from the essential elements of the immunity exception. *See Saudi Arabia v. Nelson* (Stevens, J. dissenting), 507 U.S. 349, 377 and n. 2 (1993) ("'[t]he nexus rules must be analyzed separately from the substantive immunity rules' . . . because 'the laws regulating . . . jurisdiction . . . and immunity serve different purposes, and thus require different dispositions.'") (citation omitted).

part, Congress' authority under Article I, section 8, clause 10, to "define and punish . . . Offenses against the Law of Nations." *Id.* at 436. *See also* S. Rep. at 14, 5 U.S. Code Cong. & Ad. News (1976) at 6613 (recognizing that sovereign immunity decisions are at "best made by the judiciary on the basis of a statutory regime which incorporates *standards recognized under international law*") (emphasis added).

That Congress "had *violations of international law by foreign states* in mind" when it enacted the expropriation exception, *Amerada Hess*, 488 U.S. at 435 (emphasis added), confirms that Congress and the Executive Branch intended section 1605(a)(3) to regulate post-enactment *takings*, rather than the possession, of property that has a commercial nexus with the United States. No accepted principle of international law makes the *possession* of expropriated property actionable. It is thus no mere coincidence that the statute's legislative history refers to section 1605(a)(3) as the section governing "*Expropriation claims*." S. Rep. at 19, 5 U.S. Code Cong. & Ad. News (1976) at 6618.[5]

Indeed, the State Department, which drafted the FSIA with the Justice Department, reported that the FSIA "denies immunity with respect to *expropriation* claims," noting that, before the FSIA, "*expropriation* was a public act as to which immunity should be accorded." Boyd, John A., Digest of United States Practice in International Law, *Sovereign Immunity Decisions of the Department of State May 1952-January 1977*, Appendix 1018 (Michael Sandler, Detlev F. Vagts and Bruno A. Ristau eds.) (1977) (emphasis added).

5. The 1973 hearing testimony does *not* establish, as Altmann urges (at 28-29 n. 17), that Congress determined that the FSIA should be applied retrospectively. To the contrary, the committee member *and* the State Department's Legal Adviser agreed that the FSIA should *not* be applied retrospectively. Resp. Br. 3a. That no clear statement of the statute's temporal scope was added three years later must be construed, per *Landgraf*, as consistent with Congressional intent that the FSIA should apply only *prospectively*. In any event, "[i]f clarity does not exist [in a statute], it cannot be supplied by a committee report." *United States v. Nordic Village Inc.*, 503 U.S. 30, 37 (1992).

The limited reach of the expropriation exception also is evident when compared with section 1605(a)(4) (the "succession exception"), which has the same grammatical structure. *See Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 159 (1993) (a statute "must be given 'as great an internal symmetry and consistency as its words permit'") (citation omitted). Just as the succession exception is framed to afford jurisdiction in cases "in which rights in property in the United States *acquired by succession or gift* . . . are in issue," 28 U.S.C. § 1605(a)(4) (emphasis added), so too the expropriation exception governs cases "in which rights in property *taken in violation of international law* are in issue," 28 U.S.C. § 1605(a)(3) (emphasis added).

Congress intended the succession exception to apply to cases involving rights in property obtained by gift or inherited "*by the foreign state,*" even though, as with the expropriation exception, that qualification is not expressed in the body of section 1605(a)(4). S. Rep. at 20, 5 U.S. Code Cong. & Ad. News (1976) at 6619 (emphasis added). Under Altmann's construction, however, the succession exception would create jurisdiction over any foreign state in possession of property that was, at one time, acquired by succession or gift by another foreign state, or even another person. Congress did not intend such an expansive and illogical construction of section 1605(a)(4), just as it did not intend such a construction of the expropriation exception.[6]

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6. *Amicus curiae* Bet Tzedek argues (at 6-7) that Austria had no expectation of immunity in 1948 because this case concerns claims over property acquired by inheritance or gift. But the principle, now codified in section 1605(a)(4), is (and always has been) limited to property located in the United States. *See* Sweeney, Joseph M., *Policy Research Study: The International Law of Sovereign Immunity*, U.S. Dept. of State 1, 25 (1963) ("[a] foreign state does not have immunity in actions to determine interests in estates locally administered"). Altmann apparently recognizes this obstacle, as she always avoided reference to section 1605(a)(4) in her Complaint and her submissions to the lower courts. Indeed, she

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Altmann's proposed statutory construction also runs afoul of the rule that, "[w]here the plain language of the statute would lead to 'patently absurd consequences,' that 'Congress could not possibly have intended,' [the Court] need not apply the language in such a fashion." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 470 (1989) (Rehnquist, C.J. concurring) (citations omitted). *See also Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

Under Altmann's construction, a federal court may adjudicate claims concerning property expropriated at any time in the past. According to Altmann, any foreign state may be subjected to United States jurisdiction under the expropriation exception, even if it acquired property in its possession as a *bona fide* third party purchaser, so long as a plaintiff sufficiently pleads that, *at some time in history*, the property was taken in violation of international law by another foreign state. Hence, the present-day possession could be innumerable transactions and prior owners removed from the expropriation of the property. *Indeed, the dispute over the rights in the property, under Altmann's construction, need not even be based on the expropriation*. Moreover, according to Altmann and the Ninth Circuit below, the property need not be located in the United States, so long as an agency or instrumentality of the foreign state owns or operates the property and is engaged in "a" commercial activity in the United States. 28 U.S.C. § 1605(a)(3).

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maintains (at 2 n. 1) that the dispute over Adele Bloch-Bauer's will has nothing to do with the determination of jurisdiction in this case. If, as Bet Tzedek urges, this case is based on rights in inherited property, the case should be dismissed under section 1605(a)(4), since the property is not located in the United States. *See Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) ("'however inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment' . . . [especially where] Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions") (citation omitted).

Under Altmann's construction of the statute, the temporal and physical connection to the United States of the underlying harm (*i.e.*, the alleged expropriation) may be so tenuous, as here, as to offend the sense of fairness that every Congressional statute must satisfy, and is plainly beyond what Congress and the Executive Branch intended when the FSIA was enacted.

Under *Landgraf* and its progeny, section 1605(a)(3) may only be applied prospectively to claims based on post-enactment takings in violation of international law, and does not afford jurisdiction in this case based on an alleged taking over twenty-five years before the statute's enactment.

3. The holding in Dole Food v. Patrickson is not relevant to the question before this Court. Altmann's reliance (at 26-30) on this Court's recent ruling in *Dole Food Co. v. Patrickson*, __ U.S. __, 123 S. Ct. 1655, 1662 (2003), is misplaced. Nothing in *Dole* concerned whether any of the substantive exceptions to immunity in the FSIA may be applied retrospectively. The Court's statement, that "'the jurisdiction of the Court depends upon the state of things at the time of the action brought,'" concerns the *status* of a corporate entity at the time the action is filed, *i.e.*, whether it is an agency or instrumentality of a foreign state under the FSIA. *Dole*, __ U.S. at __, 123 S. Ct. at 1662 (citations omitted).

This understanding of *Dole* is consistent with the recognized two-prong consideration of foreign sovereign immunity under the FSIA, which contemplates a threshold determination of whether the defendant is a foreign state (or agency or instrumentality of one) as defined by the FSIA. *See, e.g., Abrams*, 332 F.3d at 179 ("we turn now to the first of the two issues determinative of the [FSIA's] applicability – [the defendant's] status as a state actor").

Once the defendant's current sovereign status is established, the court turns to whether the plaintiff has established a substantive exception to the statutory presumption favoring immunity. *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 210

(3d Cir. 2003) (distinguishing between the substantive immunity of the foreign state and "the antecedent question we face here, namely, whether the entity comes within the purview of the FSIA at all"); *Gates*, 54 F.3d at 1460 n. 1 ("the threshold question of whether an entity is a foreign state" must be determined before the "courts must determine whether to impute the misdeeds of a government agency to the government itself"); *accord Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170 (5th Cir. 1989).

The first prong of the test must logically address the status of the party at the time it comes before the Court. The second prong, however, as it is concerned with the *conduct* of the foreign state that gives rise to its defense of sovereign immunity, must address the conduct underlying the cause of action *at the time that conduct occurred*. *Abrams*, 332 F.3d at 180 ("the second question . . . [concerns] whether the Act may be applied to this case even though the underlying events occurred before that statute's enactment"). It is this second prong that addresses what this Court in *Verlinden* identified as "the standards governing sovereign immunity as an aspect of substantive federal law," *Verlinden*, 461 U.S. at 496-497, which was not at all addressed by *Dole*.

III. AUSTRIA HAS NOT WAIVED ITS SOVEREIGN IMMUNITY IN THE UNITED STATES BY ITS COMMITMENTS TO RESTITUTION.

1. Austria's restitution statutes provide no basis to assert jurisdiction in the United States. Altmann and the *amici curiae* who filed in her support acknowledge that Austria's restitution efforts – through nine separate statutes and numerous settlement funds over the last fifty-five years – have been *exclusively* a matter of internal Austrian concern or addressed through diplomatic negotiations with other nations. Prior to this case, no United States court presumed that it could intrude on these efforts by asserting jurisdiction over the Republic of Austria

for a claim for restitution and damages – particularly concerning property located in Austria for over fifty years.[7]

Altmann nonetheless contorts Austria's restitution efforts into a basis for jurisdiction in this case. Altmann's assertion (at 33) that Austria has no expectation of sovereign immunity in the United States because it has provided a forum for expropriation claims in Austria is contrary to the settled rule that a foreign state does not waive immunity in another country merely because it has agreed to the jurisdiction of its own courts. *See supra* at 4.[8]

Not only is Altmann's argument contrary to existing authority, it leads to the absurd result of greater immunity for foreign states that do *not* provide a forum for such claims in their own courts than for those responsible states that do. Governments that make no effort at reparations are more likely, according to Altmann, to enjoy sovereign immunity in the United States for pre-FSIA expropriation claims than foreign states such as Austria, which has enacted numerous restitution statutes since World War II (including the 1998 art restitution statute upon

7. Although Altmann now characterizes her claim as one for replevin (at 3), her eight-count Complaint seeks far more, including claims for disgorgement of profits and compensatory damages of $150 million. J. App. 152a, 207a.

8. Altmann's assertion (at 39) that Austria had no expectation of sovereign immunity in 1948 because it had adopted a restrictive theory of sovereign immunity also is unfounded, as explained in the Brief for Petitioners (at 30). However, even if Austria's adoption of a more restrictive theory has any relevance here, and it does not, Altmann's reliance on the Austrian Supreme Court's decision in *Dralle v. Republic of Czechoslovakia*, 17 Int'l L. Rep. 155 (1950), is misplaced. *Dralle* held that a neutral state need not recognize the conduct of one belligerent state over property of another *that is located within the neutral's borders*. *Id.* at 165. Because the intellectual property in *Dralle* was registered in the Austrian Register, and therefore *located in Austria*, *Dralle* has no relevance to the pre-FSIA absolute immunity accorded to foreign states in the United States for expropriations of property *located within their own borders*.

which Altmann relies), and has entered into international agreements to facilitate such claims. No conceivable policy or logic supports such a result.

2. Austria did not waive its sovereign immunity in the United States by entering into treaties, international agreements or conventions. Altmann's assertion that Austria could not expect immunity in 1948 because it entered into treaties, international agreements and conventions that concerned restitution to Nazi victims also disregards established precedent identified in the Brief for Petitioners (at 28-29).[9]

International treaties, agreements or conventions do not create private rights of action against foreign states in United States courts unless, by their express terms, the foreign state has agreed to United States jurisdiction. *Amerada Hess*, 488 U.S. at 442. The recognition by all members of the international community, including Austria, that properties looted by Nazi Germany should, where possible, be returned to their rightful owners is not in dispute here. The numerous treaties, agreements, declarations and conventions made during and after World War

9. Austria's sovereignty in 1948 is beyond dispute, contrary to the assertion of *amici curiae* the Austrian Jewish Community and the American Jewish Congress (collectively, "AJC") (at 27). Recognition of a foreign sovereign is entirely a matter for the Executive Branch and beyond the competence of the courts to question. *National City Bank*, 348 U.S. at 358. The Executive Branch has consistently maintained from the time of World War II that Austria retained its sovereign status during the war and the subsequent Allied occupation, even though it had no recognized government from 1938 until its new government was recognized in 1946. Dep't St. Bull. Vol. XV, No. 384, 864, Nov. 10, 1946. Altmann does not contend otherwise and explicitly agrees (at 4-5) that the United States formally recognized Austria's sovereignty no later than 1946, and that Austria was "a foreign state then occupied militarily by the United States and its Allies." *See also* Brief for Petitioners at 34. Even assuming *arguendo* and contrary to fact that Austria's sovereignty was not recognized until 1955, as AJC asserts, the recognition validates all conduct of the Austrian post-war government after 1945. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303 (1918).

II to that effect do not, however, constitute a waiver of sovereign immunity in the United States by their signatories or participants, any more than the United States waived its immunity to suit in other nations by entering into these agreements. To the contrary, they embody the universally held principle that these issues should, and are, resolved through diplomatic channels rather than through private rights of action.[10]

Nor is there any merit to the assertion by *amici curiae* AJC (at 20-27) that the "Bernstein Letter" and its "antecedents and progeny" created an exception to sovereign immunity for Holocaust-related claims. That the term, "act of state," does not appear in the Bernstein Letter is no basis, as AJC asserts (at 23), to apply it any more broadly, fifty years later, than its original purpose. The Bernstein Letter has been uniformly

10. Altmann's assertion (at 33) that Austria "did not rely on immunity" is misleading, as it wrongly presupposes that an act or statement of reliance is required for sovereign immunity to attach. To the contrary, sovereign immunity automatically applies under the FSIA unless one of the specific exceptions to immunity is established by the plaintiff. 28 U.S.C. § 1604; *Verlinden*, 461 U.S. at 488. Altmann's suggestion (at 7, 34) that the Joint Statement of January 17, 2001 between Austria and the United States is somehow inconsistent with Austria's assertion of immunity here is particularly inaccurate. The suggestion that the absence of an express reservation by Austria in the Joint Statement of its sovereign immunity in this action raises any implication of waiver (or other significance under the FSIA) is nonsense. The Joint Statement expressly states that claims for restitution of works of art are not settled under that agreement and are to proceed pursuant to the Austrian Federal Law of December 4, 1998 ("Austrian Art Act"), which created the Advisory Board that reviewed and rejected Altmann's claims. Joint Statement, 2001 U.S.T. LEXIS 34, *29-30. *See also* Appendix *infra* at 1a. Altmann also misstates (at 34) the import of the letter from Mr. Winkler of the Austrian Federal Ministry for Foreign Affairs. The letter (at J. App. L) merely confirms Austria's understanding of the Joint Statement to which it refers – that art restitution claims are not settled under the Joint Statement and that this case, like other claims pertaining to art restitution, "is a matter of art restitution under the *Austrian law* [referring to the Austrian Art Act]." (Emphasis added).

recognized as speaking *solely* to the act of state doctrine. *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) ("where the Executive Branch . . . expressly represents to the Court that application *of the act of state doctrine* would not advance the interests of American foreign policy, *that doctrine* should not be applied by the courts") (emphasis added). Neither the Bernstein Letter nor the policy reflected in it have ever been adopted as an exception to sovereign immunity, either by the Executive Branch or the Court.[11]

3. Altmann's attempt to belittle the foreign policy implications of this case are unpersuasive. The interests of the United States in the question before the Court are well-stated in the Government's *Amicus Curiae* Brief, and need no repetition here. That the United States appeared as *amicus curiae* before the Ninth Circuit and this Court, rather than through a Statement of Interest, is entirely appropriate. Indeed, when the FSIA was first enacted, the State Department announced that it would participate "in cases of significant interest to the Government"

11. Important aspects of other documents were not addressed in AJC's brief, including that (1) the Allied Powers agreed in the London Declaration that restitution of Nazi-looted property would be made by the legitimate post-war government of the territory in which the property is located (Br. App. 11a;) (2) the 1921 and 1919 Treaties are not only irrelevant, as they facially apply only to "international trade" and not to expropriations of property located within Austria's territory, they do not create any private rights of action against Austria in the United States, *see, e.g.*, *Columbia Marine Services, Inc. v. Reffet, Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988) ("[an] action arises under a treaty only when the treaty expressly or by implication provides for a private right of action. The treaty must be self-executing; *i.e.*, it must prescribe rules by which private rights may be determined"); (3) the statement by the United States Secretary of State that Austria could not expect to "prevent private persons from advancing [restitution] claims" in fact continued with the Secretary's assurance that, "the United States would not support any such action after a satisfactory [diplomatic] settlement was reached." AJC Br. App. 47a. (A diplomatic settlement *was* reached, on May 22, 1959. *Settlement of Certain Claims Under Article 26 of the Austrian State Treaty*, 10 U.S.T. 1158, 1959 U.S.T. LEXIS 253.)

by "appearing as an *amicus curiae*" before the appellate courts, as it has done in this case. Dep't St. Bull. Vol. LXXV, No. 1952, Nov. 22, 1976 ("[i]f a court should misconstrue the new statute, the United States may well have an interest in making its views known to an appellate court").

The suggestion advanced by Altmann (at 42-43) that the interests of foreign states are protected, not by applying *Landgraf* to the FSIA, but, rather, by the Executive Branch filing Statements of Interest whenever it believes that retrospective application of the FSIA would adversely affect foreign relations, is contrary to a principal purpose of the FSIA, which was to release the Executive Branch from the embarrassing practice of filing (and being asked to file) case-specific statements that inevitably complicate intercourse with foreign nations. Altmann's argument also would compel courts to repeatedly turn to the Executive Branch for guidance in individual cases, contrary to the purpose of the FSIA that, henceforth, all determinations of immunity should be decided by the courts. 28 U.S.C. § 1602. *See also* Dep't St. Bull. Vol. LXXV, No. 1952, Nov. 22, 1976 ("it would be inconsistent with the legislative intent of the [FSIA] for the Executive Branch to file any suggestion of immunity on or after [the effective date of the FSIA]"); *Verlinden*, 461 U.S. at 488 ("Congress passed the [FSIA] in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assure litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process'") (quoting from H.R. Rep. No. 94-1487, p. 7 (1976), *reprinted in* 5 U.S. Code Cong. & Ad. News (1976) 6604).

That Austria's restitution to Nazi victims has provoked strong emotional responses for three generations, within and outside Austria, cannot be disputed. Neither those responses nor the history that gives rise to them, however, provide justification for expanding United States jurisdiction well beyond what the Executive Branch and Congress intended when

they drafted and enacted the FSIA, nor for betraying fundamental legal doctrines recognized by this Court since the beginning of this nation.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court reverse the opinion below and remand with instructions to dismiss the action in its entirety for lack of subject matter and personal jurisdiction.

Respectfully submitted,

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APPENDIX

EXCERPT OF ANNEX A TO JOINT STATEMENT BETWEEN THE GOVERNMENTS OF THE REPUBLIC OF AUSTRIA AND THE UNITED STATES, DATED JANUARY 17, 2001*

* * *

5. *Restitution of Works of Art*: Art restitution will proceed on an expedited basis pursuant to the Federal Law of December 4, 1998 concerning the works of art from the Austrian Federal Museums and Collections. The Austrian Federal Government will undertake its best efforts to address the issue of the return of the works of art from Austrian companies and Austrian public entities not covered by the Federal Law. The Austrian Federal Government will undertake its best efforts to encourage the adoption of similar procedures at the municipal and provincial levels. To this end, the Austrian Federal Chancellor will write a letter to governors and mayors urging them to adopt such measures, recalling the resolution by the Austrian Parliament of 1998 urging provincial and municipal museums to research the provenance of the art works in their possession and to return all such art looted during the National Socialist era to the rightful owners.

* * * *

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* Source, 2001 U.S.T. LEXIS 34, *29-30.

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No. 03-13

In the Supreme Court of the United States

REPUBLIC OF AUSTRIA, ET AL., PETITIONERS

v.

MARIA V. ALTMANN

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, authorizes United States courts to exercise jurisdiction over a claim, arising before the FSIA's enactment, that a foreign state expropriated property in violation of international law.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper construction of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, which presents the sole basis for civil litigants to obtain jurisdiction over a foreign state in United States courts. See *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). The United States has a particularly strong interest in questions respecting the FSIA's retroactive application, which carry the potential for serious adverse effects on our Nation's foreign relations. The United States also has a unique perspective on the government's sovereign immunity practice before enactment of the FSIA, when the Executive Branch bore primary responsibility for making immunity determinations.

STATEMENT

Petitioners Republic of Austria and the Austrian Gallery (collectively, Austria) challenge a court of appeals' decision arising from respondent's suit to recover artwork that was, respondent alleges, unlawfully confiscated from her uncle during the Holocaust. The court of appeals affirmed the determination of the United States District Court for the Central District of California, on Austria's motion to dismiss, that the FSIA confers jurisdiction over the suit and that respondent satisfied other procedural preconditions for bringing that action.[1]

A. Foreign Sovereign Immunity

The United States' approach to the question of foreign sovereign immunity can be separated into three distinct periods of the Nation's history. From the Nation's founding until 1952, the United States adhered to the "absolute" theory of foreign sovereign immunity. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). The Court endorsed that principle in *The Schooner Exchange* v. *M'Fadden*, 11 U.S. (7 Cranch) 116 (1812), reasoning that, as a necessary consequence of the dignity to be accorded foreign sovereigns and the need for the courts to avoid upsetting international relations, "the person of the sovereign [is immune] from arrest or detention within a foreign territory" if he enters "with the knowledge and license of its sovereign." *Id.* at 137. Under the "absolute theory of sovereign immunity," as understood and applied by the Executive Branch, "foreign sovereigns and their public property are * * * not * * * amenable to suit in our courts without

[1] Because this case is before the Court on the court of appeals' affirmance of the district court's denial of Austria's motion to dismiss, the allegations of the complaint are accepted as true for purposes of resolving petitioners' jurisdictional objections. See Pet. App. 9a.

their consent." *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938).[2]

In 1952, the United States' practice was altered when, in the "Tate Letter," the Executive announced its adoption of the "restrictive" theory of foreign sovereign immunity. See Letter from Acting Legal Adviser Jack B. Tate to Acting Attorney General Philip B. Perlman (May 19, 1962) (*reprinted in Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 711-715 (1976)). The Tate Letter stated that thenceforth the Department of State would recommend to United States courts, as a matter of policy, that foreign states be granted immunity only for their sovereign or public acts (*jure imperii*), and not for their commercial acts (*jure gestionis*). *Ibid.* See *Verlinden*, 461 U.S. at 486-487. The United States adopted the restrictive theory in light of the growing acceptance of that theory among foreign nations and the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." *Alfred Dunhill*, 425 U.S. at 714 (Tate Letter).

In 1976, Congress enacted the FSIA, which reflects the United States' current approach to foreign sovereign immunity. See Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C.

[2] Although, under the traditional approach, foreign sovereigns were absolutely immune from suit in United States courts, the question occasionally arose whether a particular *res* should be entitled to the sovereign's immunity. See, *e.g.*, *Mexico* v. *Hoffman*, 324 U.S. 30, 37 (1945). In recognition of the potential for international conflict inherent in such determinations, the courts developed the practice of deferring to the Executive Branch's judgment in such matters. See, *e.g.*, *Ex parte Republic of Peru*, 318 U.S. 578, 588-589 (1943). The courts determined whether the particular property at issue was entitled to the benefit of the foreign sovereign's immunity "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations." *Hoffman*, 324 U.S. at 34-35.

1330, 1602, *et seq.*). The FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden*, 461 U.S. at 488. "For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Ibid.* The FSIA sets forth a general rule that foreign states are immune from suit in United States courts, 28 U.S.C. 1604, and that courts may exercise jurisdiction over foreign states *only* if the suit comes within one of the specific exceptions to that rule established by Congress, see 28 U.S.C. 1605-1607. Thus, if the suit does not come within one of the exceptions, the fundamental rule of Section 1604 retains the foreign sovereign's immunity. Congress specifically intended to relieve the State Department of the diplomatic pressures associated with case-by-case suggestions of immunity and to establish legal principles to guide the courts. See *Verlinden*, 461 U.S. at 488.

B. The Factual Allegations In This Case

Respondent was a Jewish citizen of Austria who fled Nazi persecution and came to the United States, where she became an American citizen. She brought this action to recover six paintings by the famous Austrian artist Gustav Klimt that the Republic of Austria currently possesses and houses within the Austrian Gallery. The paintings at issue include the now-famous Klimt portraits of respondent's aunt, Adele Bloch-Bauer. Respondent alleges that, during the Holocaust, Nazi officials confiscated the paintings from her uncle, Ferdinand Bloch-Bauer, in violation of international law. Pet. App. 38a-41a.

According to respondent's complaint, Ferdinand Bloch-Bauer's heirs attempted to recover the expropriated property under post-war restitution laws, but Austria maintained that Adele Bloch-Bauer, who had died in 1925, had bequeathed the Klimt paintings to Austria. Pet. App. 41a-42a. Respondent recounts that, in the immediate post-war period, Austrian Gallery officials insisted that Ferdinand's heirs relinquish their claims to those Klimt paintings in exchange for the right to export other recovered property. *Id.* at 41a-44a. Respondent further asserts that, in 1998, she obtained documents from the Austrian Gallery's archives revealing that, even in 1948, the Gallery had known that Adele's testamentary wish that the paintings be donated to the Gallery was not legally binding. *Id.* at 42a-43a & n.8, 45a n.11.

Respondent and her fellow heirs filed an administrative claim in Austria, seeking return of the Klimt paintings. Pet. App. 46a-47a. The administrative committee returned a number of Klimt drawings and a portion of Ferdinand's valuable porcelain collection to Ferdinand's heirs. But the committee voted, allegedly under political pressure, to deny the claims as to the Klimt paintings. *Id.* at 47a. Although respondent could have sought review of the administrative decision through the Austrian courts upon paying a filing fee, *id.* at 8a, she instead filed this suit in federal district court, *ibid.*

Respondent claims that Austria expropriated the Klimt paintings in violation of international law and that the district court has jurisdiction pursuant to the FSIA's expropriation exception, 28 U.S.C. 1605(a)(3) (reproduced in Appendix, *infra*, 1a). Austria moved to dismiss, arguing, *inter alia*, that the FSIA could not be applied retroactively to conduct that occurred in the 1930s and 1940s. The district court denied the motion, holding that the FSIA expropriation exception confers jurisdiction over disputes arising from events predating its enactment. Pet. App. 59a.[3]

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[3] Throughout the litigation, the parties have accepted that the Republic of Austria is a foreign state, that the Austrian Gallery is an "agency or instrumentality" of that foreign state, and that the Gallery is

Austria appealed pursuant to the collateral order doctrine. See *Weltover, Inc.* v. *Republic of Argentina*, 941 F.2d 145, 147 (2d Cir. 1991), aff'd, 504 U.S. 607 (1992). The court of appeals affirmed, ruling that "the exercise of jurisdiction in this case does not work an impermissible retroactive application of the FSIA." Pet. App. 2a. That court did "not reach the broad conclusion of the district court that the FSIA may be generally applied to events predating the 1952 Tate Letter." *Id.* at 11a. It acknowledged rulings of other courts "not to apply the FSIA to events predating its enactment," *id.* at 13a-14a, and it assumed, "without deciding," that those cases were correct, *id.* at 14a. The court nevertheless concluded that application of the FSIA's expropriation exception would not be impermissibly retroactive because, in the court's estimation, the Executive Branch would not have recognized Austria's claim of immunity from respondent's World-War-II-era claim. *Id.* at 14a-21a. The court cited contemporaneous State Department pronouncements that the Allies reserved the right to declare forced property transfers in Axis territories invalid and that the courts should not refrain from passing on the validity of acts of Nazi officials. See *id.* at 17a-18a. The court reasoned, from those statements, that the Executive Branch would have allowed American courts to exercise personal jurisdiction over these

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therefore subject to the FSIA's protections. See 28 U.S.C. 1603(b). Although respondent's complaint alleges that the Republic and the Gallery had separate legal identities at the time of suit, see Compl. para. 5, respondent concedes that, "both before and after the recent 'privatization,'" the Gallery "was and is an organ of the Austrian Ministry of Education of Culture" that satisfies the FSIA definition of "agency or instrumentality." Plaintiff Maria Altmann's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss Under Fed. R. Civ. P. 12(b) at 17 n.9. The district court stated, without explanation, that "the Gallery * * * [was] no longer an organ of the Republic" when suit was filed, Pet. App. 64a, but neither party apparently shares that view.

"unfriendly" nations to compel the return of property seized in violation of international law. See *id.* at 18a-19a.[4]

SUMMARY OF ARGUMENT

Congress enacted the FSIA to provide statutory rules governing the scope of foreign sovereign immunity and to grant the courts responsibility for making immunity determinations pursuant to those legislatively prescribed principles. In part, the FSIA codified the immunity practices that the State Department had announced in 1952. But the FSIA also established new substantive rules of sovereign immunity, including a new exception from the general rule of immunity allowing United States courts to exercise jurisdiction, in certain circumstances, over suits arising from a foreign nation's taking of property in violation of international law.

Respondent is mistaken in urging that the FSIA, and the expropriation provision in particular, should be applied retroactively to allow individuals to sue foreign states in United States courts based on conduct occurring sixty years ago. This Court's decisions governing non-retroactivity establish that, in the absence of a clear statement of contrary

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[4] The court also relied on three additional considerations. First, the court reasoned that, because Austria had itself accepted the restrictive theory of immunity prior to World War II, opening American courts to hear claims against Austria merely affected "*where* a suit may be brought, not *whether* it may be brought at all." Pet. App. 20a (quoting *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 951 (1997)). Second, the court stated that other judicial decisions holding that the FSIA does not apply retroactively to pre-1952 conduct had involved "economic transactions" in which the foreign state had not recognized the restrictive theory of immunity at the time of the conduct at issue. *Id.* at 20a. Finally, the court distinguished those decisions on the ground that a foreign government's commercial activity is entitled to greater protection from retroactive legislation than are its sovereign acts taken in violation of international law. *Id.* at 21a.

intent not present here, federal legislation does not apply new rules of substantive law to events long past. That principle has particular force in this case, where the type of conduct at issue is extensively addressed through treaties, agreements, and separate legislation that were all adopted against the background assumption that such claims could not be litigated in United States courts.

The court of appeals' retroactivity analysis rests on a fundamental misunderstanding of the United States' law and practice regarding foreign sovereign immunity before the 1952 Tate Letter. Contrary to that court's impression, the United States adhered to the "absolute" theory of immunity at the time of Austria's challenged conduct and did not recognize an exception to immunity for expropriations or other violations of international law. The United States did not follow any established exception allowing this Nation's courts to exercise jurisdiction over "unfriendly" nations. Indeed, even today, the FSIA does not provide any such categorical exception. The courts should not engage in an attempt to surmise whether, more than half a century ago, the Executive Branch would have denied immunity to a particular foreign state on some extraordinary or ad hoc basis, such as punishment for particularly egregious conduct. The courts of that era would never have presumed the authority to make such inherently political decisions, and the FSIA does not provide the courts of this era authority to speculate retroactively on what the Executive and the courts might have done.

ARGUMENT

THE FSIA DOES NOT AUTHORIZE UNITED STATES COURTS TO EXERCISE JURISDICTION OVER AN EXPROPRIATION CLAIM AGAINST A FOREIGN STATE BASED ON CONDUCT THAT OCCURRED BEFORE ENACTMENT OF THE FSIA

The court of appeals erred in two fundamental respects. First, it failed to give proper account to this Court's retroactivity decisions, which counsel that the FSIA's expropriation exception should not be applied retroactively to conduct that predated enactment of the FSIA and, indeed, predated the United States' adoption of the restrictive theory of foreign sovereign immunity in 1952. Second, the court erred by relying on its own speculation that, notwithstanding the United States' pre-1952 adherence to the doctrine of absolute sovereign immunity, the Executive Branch would have departed from the United States' practice during that period in the case of Holocaust claims.

A. This Court's Retroactivity Decisions Preclude Application Of The FSIA's Expropriation Exception To Claims That Arose Before Enactment Of The FSIA

1. The FSIA is subject to established retroactivity principles. This Court's decisions establish that any statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," is presumed to apply prospectively only. *Landgraf* v. *USI Film Prod.*, 511 U.S. 244, 280 (1994). That presumption applies to statutes that, although termed "jurisdictional," change the law in a way that "eliminates a defense to * * * suit." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 948 (1997). Such a change "does not merely allocate jurisdiction among forums." *Id.* at 951. "Rather, it

creates jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Ibid.* "Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to [the] presumption against retroactivity as any other." *Ibid.*

The defense of foreign sovereign immunity is a matter of "*substantive* federal law," *Verlinden* 461 U.S. at 493 (emphasis added). See *Ex parte Republic of Peru*, 318 U.S. at 588 (describing foreign sovereign immunity as "an overriding principle of substantive law"). As in *Hughes*, Congress's elimination of such a defense is subject to the presumption against retroactive legislation. Indeed, every court of appeals that has squarely addressed the issue has concluded that the abolition of a foreign state's previously recognized immunity from suit constitutes a substantive change that is subject to the presumption against retroactivity. See *Joo* v. *Japan*, 332 F.3d 679, 684 (D.C. Cir. 2003) ("The commercial activity exception to the FSIA, by qualifying what previously had been the absolute immunity of foreign sovereigns, * * * 'creates jurisdiction where none previously existed' and therefore affects the substantive rights of the concerned parties." (quoting *Hughes*, 520 U.S. at 951)); *Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.) ("retroactive application of the FSIA [to claims based on bearer bonds issued in 1916] would affect adversely the USSR's settled expectation * * * of immunity from suit in American courts"), cert. denied, 487 U.S. 1219 (1988); *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497-1498 (11th Cir. 1986) ("to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns" and would be "manifestly unfair"), cert. denied, 480 U.S. 917 (1987).

2. The application of those retroactivity principles depends on the particular FSIA provision at issue. Federal statutes are frequently an amalgam of procedural and substantive provisions. As a result, retroactivity principles must be applied in light of the content of the particular provisions at issue. On the one hand, some provisions of a statute may be properly characterized as procedural or as not affecting substantive rights, and they are properly applied to all pending cases. On the other hand, provisions that create new substantive obligations and liabilities are properly presumed to apply only prospectively unless Congress clearly expresses a contrary intent. See, *e.g.*, *INS* v. *St. Cyr*, 533 U.S. 289 (2001).[5]

In the case of the FSIA, some provisions—such as the service-of-process and removal provisions—are readily identifiable as procedural and presumptively apply to all litigation filed after the FSIA's effective date. See *St. Cyr*, 533 U.S. at 318. Other provisions, such as the FSIA's codification of the general rule of foreign sovereign immunity, 28 U.S.C. 1604, and the common-law exceptions regarding waiver and counterclaims that existed before the FSIA and, indeed, before the Tate Letter, see, *e.g.*, *Ex parte Republic of Peru*, 318 U.S. at 589; *Guaranty Trust Co.*, 304 U.S. at 134-135, simply restate pre-existing principles and apply regardless of when the challenged conduct occurred. See, *e.g.*, *Joo*, 332 F.3d at 686-687 (considering but rejecting proposition that Japan's violation of fundamental international

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[5] In *St. Cyr*, the Court analyzed the question of retroactivity separately for each provision of the statute at issue, concluding that some provisions would present no question of retroactivity while others, which affected substantive rights, were subject to a presumption against retroactive application. See 533 U.S. at 318-320. In undertaking this provision-by-provision analysis, the Court concluded that statements of congressional intent as to the retroactive application of some provisions did not imply a similar intent with regard to other provisions. See *ibid.*

law norms in the 1930s and 1940s would constitute an implied waiver of immunity under 28 U.S.C. 1605(a)(1)); *Carl Marks*, 841 F.2d at 27 (noting that a pre-1952 claim against the Soviet Union could have proceeded under the FSIA if the Soviet Union had "consented to suit").

Other provisions of the FSIA, however, require a different result. Most significantly, new exceptions to the general rule of foreign sovereign immunity that abrogate past protections from suit are properly viewed under *Hughes* as abridging substantive rights. In that situation, however, care must be taken in examining the character of the right in question. For example, the FSIA's "commercial activity" exception (28 U.S.C. 1605(a)(2)), for the most part, codified past practice, but only as it had existed since the issuance of the Tate Letter in 1952, which announced that a foreign state's commercial activities could provide a predicate for a cause of action in United States courts. See *Verlinden*, 461 U.S. at 488. Consequently, the FSIA's commercial activity exception generally can be applied, without raising retroactivity concerns, to conduct occurring after 1952. See *Joo*, 332 F.3d at 684; *Carl Marks*, 841 F.2d at 27; *Jackson*, 794 F.2d at 1497-1498.

3. The FSIA's expropriation exception created a new substantive liability that is subject to the presumption of non-retroactive application. Under the absolute theory of sovereign immunity, a foreign state, by definition, was not subject to liability for expropriations within its own borders. And even under the restrictive theory, a foreign state's act of expropriation was a public or "sovereign" act, as to which the foreign state retained its sovereign immunity. The expropriation exception very clearly did not exist in 1952 and, indeed, was a new development in the doctrine of sovereign immunity when the FSIA was enacted 24 years later.

The Second Circuit directly addressed that question in *Victory Transport Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (1964), cert. denied, 381 U.S. 934 (1965). The court explained that, even under the restrictive theory of sovereign immunity, foreign states continued to enjoy immunity with respect to suits challenging "strictly political or public acts about which sovereigns have traditionally been quite sensitive," which included, in particular, suits respecting the "nationalization" of property. *Id.* at 360.[6] The Second Circuit's analysis in *Victory Transport* was recognized at the time as an "authoritative statement of the sovereign immunity doctrine in the United States." Andreas F. Lowenfeld, *The Sabbatino Amendment–International Law Meets Civil Procedure*, 59 Am. J. Int'l L. 899, 907 (1965). Indeed, this Court has frequently cited the *Victory Transport* decision as illustrating the pre-FSIA application of the restrictive theory of sovereign immunity. See *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 361 (1993); *Republic of Argentina*, 504 U.S. at 613; *Alfred Dunhill*, 425 U.S. at 703 (plurality opinion).[7]

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[6] See Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666, 1666 (June 1966) ("Since expropriation is not a 'private' state act for purposes of the restrictive doctrine of sovereign immunity announced in the Tate Letter, a United States investor is not able to litigate his claim by obtaining quasi-in-rem jurisdiction over an expropriating state's assets in the United States." (footnotes omitted)); Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1618 (June 1962) ("Since expropriation is a governmental act, sovereign immunity will frustrate attempts to sue the state.").

[7] See also Comment, *American Oil Investors' Access to Domestic Courts in Foreign Nationalization Disputes*, 123 U. Pa. L. Rev. 610, 625 (1975) (noting that "no judicial opinion has challenged" *Victory Transport*'s conclusion that expropriations were *jure imperii* as to which a foreign state retained its immunity). See, *e.g.*, *Chemical Natural Res., Inc.* v. *Republic of Venezuela*, 215 A.2d 864 (Pa. 1966) (dismissing expropriation claim in which State Department filed suggestion of immunity; *Rich* v. *Naviera Vacuba S.A.*, 197 F. Supp. 710, 724-725 (E.D. Va.) (accord), aff'd 295 F.2d 24 (4th Cir. 1961); but cf. *Stephen* v. *Zivnostenska*

The *Victory Transport* decision rested on the pre-FSIA understanding that private complaints about foreign expropriations were simply not matters for resolution in United States courts. Rather, they were to be resolved through (1) "negotiation," (2) "remedies in the local courts" of the expropriating government, or (3) State Department espousal, in which case the State Department would seek compensation "through either diplomatic negotiation or adjudication before an arbitral body or international court." Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666, 1666 (June 1966). There are numerous pre-FSIA examples of such executive agreements through which the State Department espoused and settled private expropriation claims. See generally *Dames & Moore* v. *Regan*, 453 U.S. 654, 679-683 (1981).[8]

4. There is no basis for overcoming the presumption that the FSIA's expropriation exception is non-retroactive. Respondent would have the courts infer that Congress intended the FSIA's expropriation exception to authorize litigation of all expropriation claims, including claims that arose when the United States adhered to the absolute theory of immunity. There is no basis for doing so.

Banka, 15 A.D. 2d 111, 119-120 (N.Y. App. Div. 1961), aff'd, 186 N.E.2d 676 (1962).

[8] See, *e.g.*, Yugoslavia: Claims of U.S. Nationals, Nov. 5, 1964, U.S.-Yugo., 16 U.S.T. 1; Bulgaria: Claims, Jul. 2, 1963, U.S.-Bulg., 14 U.S.T. 969; Poland: Settlement of Claims of U.S. Nationals, Jul. 16, 1960, U.S.-Pol., 11 U.S.T. 1953; Romania: Settlement of Claims of U.S. Nationals and Other Financial Matters, Mar. 30, 1960, U.S.-Rom., 11 U.S.T. 317. As a further example, when Congress chose to provide unilateral relief to United States citizens whose property was expropriated by Czechoslovakia, it did so through an administrative scheme funded with proceeds from the sale of blocked foreign state assets; it did not encourage wholesale litigation against the foreign state. See International Claims Settlement Act Amendments of 1958, Pub. L. No. 85-604, 72 Stat. 527 (22 U.S.C. 1642 *et seq.*).

This Court has made clear that it will not infer that Congress intended retroactive application of a substantive provision in the absence of a "clear indication" of congressional intent. *St. Cyr*, 533 U.S. at 316. Rather, a law will be given a "truly 'retroactive' effect" only where the "statutory language * * * [is] so clear that it could sustain only one interpretation." *Lindh* v. *Murphy*, 521 U.S. 320, 328 n.4 (1997). The FSIA does not contain the "clear indication" that would be required to upset a foreign state's reasonable expectations of continued immunity from suit based on alleged expropriations occurring before the FSIA was enacted. The FSIA is simply bare of any unambiguous indication that Congress intended the expropriation exception, or like substantive provisions, to reach conduct that occurred during World War II. See *Joo*, 332 F.3d at 685-686; see also *Abrams* v. *Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173, 184 (2d Cir. 2003), petition for cert. pending, No. 03-284 (filed Aug. 19, 2003).[9]

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[9] Some courts have attempted to determine Congress's intention by reference to a statement in the FSIA's "Findings and declaration of purpose" that "[c]laims of foreign states to immunity *should henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth [in the FSIA]." 28 U.S.C. 1602 (emphasis added). That statement, however, provides no clear guidance. The "most probable meaning of the sentence is that the State Department would no longer consider petitions for sovereign immunity" and that such determinations would thereafter be decided by the courts. *Joo*, 332 F.3d at 686; see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, 14 (1976). In doing so, the courts could be expected to apply usual rules of statutory construction, including the presumption against retroactive application of new substantive rules. In any event, Section 1602 manifests no clear intent to *deny* immunity that would have been recognized for past sovereign conduct. See *Jackson*, 794 F.2d at 1497 (this language "appeared to be prospective" only and counseled against retroactive application); see also *Abrams*, 332 F.3d at 184 (noting that "[c]ourts have in fact reached diametrically opposite conclusions regarding Congressional purpose").

By contrast, Congress *has* provided "clear indication," in subsequent FSIA amendments, when it has sought to give substantive FSIA provisions retroactive effect. See, *e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(c), 110 Stat. 1243 (providing that the immunity exception for designated state sponsors of terrorism "shall apply to any cause of action arising before, on, or after the date of the enactment of this Act"). Those specifications not only provide clear guidance on the proper application of the provisions at issue, but also indicate that Congress is attentive to the need to designate clearly those substantive provisions that shall have retroactive effect. See *St. Cyr*, 533 U.S. at 318-319 ("[a]nother reason for declining" to adopt a retroactive reading of § 304(b) "is provided by Congress' willingness, in other sections of IIRIRA, to indicate unambiguously its intention to apply specific provisions retroactively").[10]

[10] This Court's *in rem* decisions, which recognize that a federal court's jurisdiction is not barred by a mere suggestion of a foreign government's ownership of a *res*, are inapposite to the inquiry here. See *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491, 507 (1998); note 2, *supra*. As this Court has explained, there is a critical distinction between adjudicating legal title over disputed property that is present within the court's territorial jurisdiction, even where one of the claimants is a foreign government, and resolving a separate claim of wrongdoing against a foreign sovereign through *in personam* or *quasi in rem* jurisdiction. See *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 351 (1822) (recognizing "the exemption of a public ship from proceedings *in rem*, in our Courts for illegal captures on the high seas," but holding that no similar rule "exempts her *prizes* in our ports from the ample exercise of our jurisdiction"). See also *Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 138 N.E. 24, 25 (N.Y. 1923) (distinguishing between proceedings respecting "title to property situated within the jurisdiction of our courts" and suits where "[t]he government itself is sued for an exercise of sovereignty within its own territories").

5. Retroactive application of the FSIA's expropriation exception would be inconsistent with international norms. This Court may usefully consult international norms in assessing whether the expropriation provision is retroactive. The general understandings of the international community support the conclusion that the expropriation exception should not be given retroactive effect. For example, in cases before the International Court of Justice, a party's obligations and liabilities arising from past conduct "must be appraised * * * in the light of the rules of international law as they existed at the time, and not as they exist today." Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, XXX British Year Book of International Law 5 (1953). See, *e.g.*, *Ambatielos Case (Greece v. United Kingdom)*, 1952 I.C.J. 28, 40 (Preliminary Objection of Jul. 1) (rejecting an argument of Greece that "would mean giving retroactive effect to Article 29 of the Treaty of 1926").[11]

The presumption against projecting new legal developments onto past acts in the international arena is directly

[11] Similarly, international commentators have recognized "the general principle that a juridical fact must be appreciated in light of the law contemporary with it." 1 Robert Jennings & Arthur Watts, *Oppenheim's International Law* 1281-1282 (9th ed. 1992). That principle also finds expression in Article 28 of the Vienna Convention on the Law of Treaties (entitled "Non-retroactivity of treaties"), which provides that, "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." Although the United States has not ratified the Vienna Convention, the United States generally recognizes the Convention as an authoritative guide to principles of treaty interpretation. See, *e.g.*, *Fujitsu Ltd.* v. *Federal Express Corp.*, 247 F.3d 423, 433 (2d Cir.), cert. denied, 534 U.S. 891 (2001); see also Vienna Convention on the Law of Treaties, S. Exec. Doc. L, 92d Cong., 1st Sess. 1, 19 (1971).

relevant in the case of World-War-II-era claims. Long before the FSIA established the expropriation exception for the first time, the United States had entered into numerous treaties and executive agreements that addressed claims relating to the conduct of Germany and its Axis allies, as well as Austria, during World War II.[12] The United States and other foreign nations entered into those agreements against the background assumption that foreign states could not be sued in United States courts. The retroactive application of the FSIA to pre-1952 conduct therefore would introduce significant new issues that the negotiators of those instruments could not have foreseen.[13]

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[12] See, *e.g.*, State Treaty for the Re-establishment of an Independent and Democratic Austria, May 15, 1955, art. 26, 6 U.S.T. 2369, 2435 (providing for return by Austria of all property confiscated on account of the racial origin or religion of the owner); Dep't St. Bull., July 9, 1956, at 66 (announcing Austrian law procedures for compensation of persons who had fled Austria); Austria: Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, May 22, 1959, U.S.-Aus., 10 U.S.T. 1158 (establishing administrative settlement fund for certain property claims); Convention on the Settlement of Matters Arising out of the War and the Occupation, as amended, Oct. 23, 1954, 6 U.S.T. 4411 (Germany); Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169; War Claims Act of 1948, ch. 826, 62 Stat. 1240 (50 U.S.C. App. 2001 *et seq.*) (administrative system for making payments from vested enemy assets to prisoners of war). In 2001, the United States and Austria also concluded an agreement under which the Government of Austria committed to the establishment of a fund to make payments to certain people with Holocaust-related claims. See *American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2383 & n.3 (2003). That agreement excludes claims, such as the one in this case, for artwork. See Agreement Relating to the Agreement of Oct. 24, 2000, Concerning the Austrian Fund "Reconciliation, Peace, and Cooperation", Jan. 23, 2001, U.S.-Aus., 2001 WL 935261, Annex A (Reconciliation Fund). Austria has, however, adopted a domestic administrative mechanism to review art restitution claims. See Pet. App. 7a, 46a.

[13] For instance, in *Joo*, the plaintiffs sued Japan respecting that nation's conduct during World War II. See 332 F.3d at 680. The plaintiffs urged that their claims fell within the FSIA's exceptions and that the 1951 Japan Peace Treaty did not speak with sufficient clarity to cut off their right to litigate war-related claims in United States courts. The drafters, however, had no reason to provide such clear language in the Treaty because they could not reasonably have conceived of war-related claims being litigated in the courts of the United States or other allied powers. See *id.* at 684-685.

In short, both domestic and international law principles lead to the same result. The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country," *Saudi Arabia*, 507 U.S. at 355 (quoting *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989)), and the FSIA exceptions can be applied retroactively to override the rule of immunity set forth in Section 1604 only where the particular exception at issue was recognized by the United States at the time of the challenged conduct. Because the United States did not recognize an expropriation exception before the FSIA's adoption, respondent cannot invoke that exception as the basis for asserting jurisdiction, particularly with respect to an alleged expropriation during the 1930s or 1940s.[14]

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[14] This result is consistent with the approach of other countries that have adopted statutes similar to the FSIA. Typically, those enactments expressly provide that the exceptions to immunity are not retroactive or have been so construed by the courts. See State Immunity Act, 1978, § 23 (Eng.) (*reprinted in* 17 I.L.M. 1123 (1978)); Foreign States Immunities Act, 1985, § 7 (Austl.) (*reprinted in* 25 I.L.M. 715 (1986)); State Immunity Act, 1979, § 1 (Sing.) (*available at* http://agcvldb4.agc.gov.sg/); State Immunity Act, 1982 (Can.) (*reprinted in* 21 I.L.M. 798 (1982)); see *Tritt* v. *United States*, [1989] Ont. Sup. C.J. Lexis 455, at * 6 (stating that the Canadian statute is non-retroactive); accord *Carrato* v. *United States*, [1982] 40 O.R. (2d) 459 (H.C.), judgment endorsed and appeal dismissed, File No. 22/83 (Ont. Ct. App. Oct. 17, 1983) (unreported). While the foreign statutes post-date the FSIA, Congress presumably was aware of the governing principle, which also appeared in the European Convention on State Immunity. See Council of Europe: European Convention on State Immunity and Additional Protocol, art. 35(3), 11 I.L.M. 470, 482 (1972)

B. The Court Of Appeals Erred By Relying On Unfounded Speculation That, Before Enactment Of The FSIA, The Executive Branch Would Have Abridged A Foreign State's Sovereign Immunity In The Instance Of Holocaust Claims

1. The court of appeals erred in attempting to surmise whether the Executive Branch would have recognized a special exception for Holocaust claims before enactment of the FSIA. Because Congress did not clearly express an intent that the FSIA's expropriation exception would have retroactive effect, the judicial inquiry into the availability of that exception for pre-FSIA conduct should be at an end. Instead, the court of appeals mistakenly attempted to divine whether, before enactment of the FSIA, the Executive Branch might have departed from established sovereign immunity principles on a country-specific or case-specific basis. The FSIA, which directs the courts to resolve foreign sovereign immunity claims "in conformity with the principles set forth in the [FSIA]," 28 U.S.C. 1602, provides no room for such speculation, which would usurp, retroactively, the Executive's foreign policy responsibility with respect to foreign sovereign immunity at that time. See *Verlinden*, 461 U.S. at 486. In any event, the court's conjectures are without foundation.[15]

("Nothing in this Convention shall apply to proceedings arising out of, or judgments based on, acts, omissions or facts prior to the date on which the present Convention is opened for signature."); see also H.R. Rep. No. 1487, *supra*, at 23, 25 (referring generally to the European Convention).

[15] The Second Circuit has adopted a similarly mistaken approach in *Garb* v. *Republic of Poland* and *Whiteman* v. *Austria*, 72 Fed. Appx. 850, 854 (2003) ("we remand for determinations of the Department of State's policy prior to FSIA with respect to sovereign immunity for Poland and Austria in the circumstances presented in each of the instant cases"), petitions for cert. pending, Nos. 03-500 & 03-517. The Court should

2. The United States did not condition a foreign state's right to absolute immunity on whether the state was an "unfriendly" nation. The court of appeals mistakenly suggested that, before enactment of the FSIA, only "friendly" nations qualified for sovereign immunity. See Pet. App. 14a-15a (quoting *Verlinden*, 461 U.S. at 486). Although the term "friendly foreign sovereigns" does appear in some decisions from the time when the United States applied the absolute theory of immunity, there was no generally recognized exception to immunity for "unfriendly" sovereigns. That language has its origin in *in rem* cases and refers only to the unremarkable fact that the United States would not refrain from seizing an enemy's warships or other property during time of war.[16] There is no support in this Court's decisions for the proposition that United States courts would have reached out to exercise *in personam* or *quasi in rem* jurisdiction over a foreign state for sovereign acts taken within

therefore hold those petitions and dispose of them in accordance with its disposition of this case.

[16] The Court's references to "friendly" foreign states (*Verlinden*, 461 U.S. at 486) can be traced through past *in rem* cases, including *Hoffman*, 324 U.S. at 34, and *Ex parte Republic of Peru*, 318 U.S. at 588, to *The Schooner Exchange*. In that case, the Court stated the general principle that "the person of the sovereign [is immune] from arrest or detention within a foreign territory" if he enters "with the knowledge and license of its sovereign." 11 U.S. (7 Cranch) at 137. The Court then discussed whether that immunity extended to a foreign sovereign's warship that had entered an American harbor. The Court observed that "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace," *id.* at 141, and it held, therefore, that immunity also extends to "national ships of war, entering the port of a friendly power open for their reception." *Id.* at 145-146. The implicit indication that the United States would not refrain from seizing a belligerent nation's warships if they entered a United States port during time of war says nothing about whether that nation would be subject to private suit in United States courts during the hostilities or after they ceased.

its own territory simply because the United States was not on "friendly" terms with that government during the period of the challenged conduct.[17]

Contrary to the court of appeals' mistaken impression, the United States has not followed a practice of withholding sovereign immunity from "unfriendly" foreign states. Rather, the United States' longstanding policy and practice is to prevent courts from becoming entangled in the conduct of foreign relations and to resolve war-related claims through diplomatic or political, rather than judicial, means.[18] Creating an exception for "unfriendly" nations would likely cause the very type of "embarrass[ment] * * * [to] the Government in conducting foreign relations" that the doc-

[17] The United States, on occasion, has taken steps to freeze, seize, or divest an enemy nation's assets within this country so as to deprive the enemy of their use. See, *e.g.*, International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.*; Trading with the Enemy Act, ch. 106, 40 Stat. 411 (50 U.S.C. App. 1 *et seq.*). But such actions cannot be equated with authorizing United States courts to adjudicate claims directly against a non-consenting, unfriendly sovereign with respect to acts committed within its own territory, including after normal relations between nations had resumed. See *Wulfsohn*, 138 N.E. at 25.

[18] See note 8, *supra*; see also, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763, 789 n.14 (1950) ("the rights of our citizens [under the Geneva Convention relating to prisoners of war] are vindicated only by Presidential intervention"); *Joo*, 332 F.3d at 684-685 (noting policy that World War II claims against Japan be resolved exclusively through diplomatic means); cf. *Garamendi*, 123 S. Ct. at 2380-2382; *Dames & Moore*, 453 U.S. at 679-680; *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 310 (1918); *Oetjen*, v. *Central Leather Co.*, 246 U.S. 297, 303 (1918); *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). Indeed, when Congress itself has acted to provide redress for war-related claims, as after World War II, it has done so through administrative war claims commissions, not through the courts. See, *e.g.*, War Claims Act of 1948, ch. 826, 62 Stat. 1240 (50 U.S.C. App. 2001 *et seq.*); International Claims Settlement Act Amendments of 1955, ch. 645, 69 Stat. 562 (22 U.S.C. 1641 *et seq.*).

trine of immunity is intended to avoid. See *Ex parte Republic of Peru*, 318 U.S. at 588.[19]

Indeed, even if the United States had followed a pre-FSIA practice of withholding immunity from "unfriendly" nations, the responsibility for drawing lines among foreign governments and determining when to strip them of immunity would have belonged with the political Branches that are charged with responsibility for this Nation's foreign relations. The court of appeals' approach would require courts to establish their own definition of "friendly," to assess historical relationships of the United States under that definition, and to decide how to weigh changes in relations during the period when suit might have been brought. That approach is not only unprecedented, but it is fraught with difficulties.[20]

The FSIA does not permit courts to draw such lines, but instead continues the United States' historic policy and practice. It contains no exception to the general rule of foreign sovereign immunity for "unfriendly" sovereigns. The court of appeals' mistaken understanding would subject foreign nations to suit on precisely those claims that the

[19] As a practical matter, an *in personam* suit could be meaningfully pursued only once the hostilities are over and the warring nations have resumed friendly relations. If the conclusion of battlefield operations signaled the start of new hostilities in each nation's courts, those nations would find it far more difficult, if not impossible, to move past their former antagonisms and build constructive new relations. See *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 198, 230 (1796) (opinion of Chase, J.).

[20] For example, contrary to the court of appeals' view, the United States was not at war with the State of Austria during World War II. Indeed, the United States took the view that Austria was the first country to be occupied by Nazi Germany. See Declaration on Austria at Moscow, *quoted in* S. Exec. Rep. No. 8, 84th Cong., 1st Sess. 3 (1955). Such subtle distinctions in our Nation's foreign relations highlight the problem with courts undertaking the kinds of assessments that the court of appeals' decision would require.

courts have heretofore consistently recognized to lie at the core of a foreign state's sovereign immunity.[21]

3. The United States did not depart from the governing principles of sovereign immunity in the case of Holocaust-related claims. The court of appeals further concluded that, before enactment of the FSIA, the United States would have rejected a foreign nation's assertion of sovereign immunity from Holocaust-related claims based on the extraordinary character of those claims. Pet. App. 15a-21a. The court relied on government statements, documents, and actions expressing the United States' strong condemnation of Nazi atrocities. Those expressions, however, do not suggest, much less establish, a policy of the United States that the vast universe of potential private claims against the foreign states that formerly had Nazi governments should be resolved through litigation in United States courts.

Before enactment of the FSIA, United States courts clearly understood that questions of sovereign immunity would be decided "in conformity to the *principles* accepted by the department of the government charged with the conduct of our foreign relations." *Hoffman*, 324 U.S. at 34-35 (emphasis added). Those courts would not have taken it upon themselves to try to discern, from public pronouncements that do not address the question of foreign sovereign immunity, whether the State Department might announce a new immunity exception, with potentially serious consequences for the United States' foreign relations. This Court has previously rejected the notion that the scope of foreign

[21] See *Saudi Arabia* v. *Nelson*, 507 U.S. at 361-363, 362 n.5 (noting that, under the restrictive theory, foreign sovereigns retained their immunity "with respect to claims involving the exercise of the power of the police or military"); *Victory Transport*, 336 F.2d at 360 (restrictive theory retains immunity for "public acts about which sovereigns have traditionally been quite sensitive," such as "acts concerning the armed forces").

sovereign immunity can be pared back by reference to statements that have little or nothing to do with the issue. See *Amerada Hess Shipping*, 488 U.S. at 442 (holding that even a treaty "stat[ing] that compensation shall be paid for certain wrongs" by a foreign government does not imply an abrogation of immunity from private suit). The Court should likewise reject the notion that such statements are useful in determining the retroactive scope of the FSIA.

For example, the court of appeals believed that the fact that Nazi atrocities had violated international law, see Pet. App. 15a, and that the chief architects of the Holocaust had been tried before the international court at Nuremberg, see *id.* at 19a-20a, was evidence that "the international community, and particularly the United States . . . would not have supported a broad enough immunity to shroud the[se] atrocities" from suit, *ibid.* (quoting *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166, 1179 (D.C. Cir. 1994) (Wald, J., dissenting), cert. denied, 513 U.S. 1121 (1995)). But the other courts of appeals that have encountered such arguments, including the D.C. Circuit in *Princz*, have rejected them.

The majority in *Princz* held that the FSIA did not provide an exception to immunity that reached the Nazis' slave labor atrocities, and it rejected Judge Wald's contention that violations of fundamental human rights should be deemed an "implied waiver" of immunity under 28 U.S.C. 1605(a)(1). *Princz*, 26 F.3d at 1171-1175. The majority reasoned that "something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world." *Id.* at 1174-1175 n.1.

The Seventh Circuit, in *Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145 (2001), also rejected the argument that the Nazi slave labor atrocities warranted creating an

exception from immunity. The court stated that "[t]he potential scope of a customary international law exception to foreign sovereign immunity * * * would allow for a major, open-ended expansion of our jurisdiction into an area with substantial impact on the United States' foreign relations." *Id.* at 1156. Similarly, the Second Circuit rejected such arguments in holding that a foreign state retained its immunity from suit alleging that the state was responsible for a terrorist bombing of an airliner. See *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244 (1996).

The court of appeals also placed mistaken reliance on the act of state doctrine and, in particular, the so-called "*Bernstein*" exception to that doctrine. See Pet. App. 16a-18a.[22] The act of state doctrine and the *Bernstein* exception say nothing about the scope of foreign sovereign immunity. Indeed, the *Bernstein* litigation (note 22, *supra*), which led to the recognition of the *Bernstein* exception, involved a Dutch corporation, not a foreign government. The State Depart-

[22] The act of state doctrine is a rule of decision, founded on considerations of comity and deference to the Executive Branch's conduct of foreign relations, that "precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). See *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990). The *Bernstein* exception arose from a private plaintiff's attempt to recover commercial property, originally seized by the Nazis, from a Dutch corporation. See *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 173 F.2d 71, 72 (2d Cir. 1949). The plaintiff's claims raised questions respecting the validity of acts of Nazi officials in Germany. The Second Circuit initially concluded that the act of state doctrine precluded inquiry into those questions. *Ibid.* The State Department thereafter issued the so-called *Bernstein* Letter stating a policy "to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." See *Bernstein* v. *Nederlandsche-Amerikaansche*, 210 F.2d 375, 376 (2d Cir. 1954).

ment's *Bernstein* Letter addressed solely whether it was appropriate for a United States court to "pass upon the validity of the acts of Nazi officials" in Germany. *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 376 (2d Cir. 1954). The *Bernstein* Letter does not speak at all to the susceptibility of the German government, let alone the Austrian government, to suit in United States courts for acts in Austria. See Letter from Legal Adviser Monroe Leigh to the Solicitor General (Nov. 26, 1975) (describing the *Bernstein* Letter as "advis[ing] that the *act of state doctrine* need not apply to a class of cases involving Nazi confiscations" (emphasis added)), *reprinted in Alfred Dunhill*, 425 U.S. at 706, 708.[23]

In focusing on irrelevant matters, such as the *Bernstein* exception to the act of state doctrine, the court of appeals ignored the concrete steps the United States has actually taken to redress Nazi-era wrongs. The United States did not encourage private litigation against foreign states in

[23] This Court has itself recognized that, while the act of state doctrine "shares with the immunity doctrine a respect for sovereign states," the doctrines are distinct and serve different purposes. *Sabbatino*, 376 U.S. at 438. See *Zwack* v. *Kraus Bros. & Co.*, 237 F.2d 255, 259-261 (2d Cir. 1956) (declining, with reference to the *Bernstein* Letter, to recognize the validity of Hungary's uncompensated expropriation, while, at the same time, recognizing that the Hungarian government itself was "not subject to the jurisdiction of the court below unless its should voluntarily appear"). The distinction between the doctrines is also evident in the so-called Second Hickenlooper Amendment, which, in response to *Sabbatino*, eliminated the act of state doctrine in certain cases concerning expropriations in violation of international law. 22 U.S.C. 2370(e)(2). It was widely understood that this legislation was "restricted entirely to the act of state doctrine" and did not "deny the foreign defendant its defense of sovereign immunity." Comment, *supra*, 123 U. Pa. L. Rev. at, 623 n.64. See also Andreas F. Lowenfeld, *supra*, 59 Am. J. Int'l L. at, 907; *American Hawaiian Ventures, Inc.* v. *M.V.J. Laturharhary*, 257 F. Supp. 622 (D.N.J. 1966).

United States courts as the appropriate means of remedying those wrongs. Instead, the United States committed considerable energy to obtaining redress through other means. It entered into post-war treaties with both Germany and Austria, obtaining promises on the part of those governments to provide for the return of confiscated property. See note 12, *supra*. It also negotiated agreements or provided, through legislation, for the payment of certain claims. See note 18, *supra*. Those arrangements envisioned restitution or compensation under schemes adopted as part of domestic German or Austrian law, through diplomatic arrangements, or through domestic administrative schemes, such as Austria's recent program to review claims for the return of art. See Pet. App. 7a, 46a. In no case has the United States created "a private right of action against our wartime enemies or their nationals." *Deutsch* v. *Turner Corp.*, 324 F.3d 692, 712 (9th Cir.), cert. denied, 124 S. Ct. 105 (2003).

4. Austria did not lose its right to absolute sovereign immunity in United States courts by adopting the restrictive theory of foreign sovereign immunity. The court of appeals incorrectly concluded that application of the FSIA expropriation exception to Austria was not impermissibly retroactive because it "affect[s] only *where* a suit may be brought, not *whether* it may be brought at all." Pet. App. 20a (quoting *Hughes*, 520 U.S. at 951). The court of appeals reached that conclusion on the mistaken understanding that, because Austria had itself adopted the restrictive theory of foreign sovereign immunity in the 1920s, it "could have had no reasonable expectation of immunity in a foreign court." *Id.* at 19a. But, as previously explained, the restrictive theory preserved a foreign state's immunity from claims concerning its distinctly public acts, "such as nationalization." *Victory Transport*, 336 F.2d at 360. Consequently, the timing of Austria's adoption of the restrictive theory of immunity is irrelevant.

Moreover, Austria's application of the restrictive theory of immunity to foreign states in its own courts would not have precluded it from asserting absolute immunity in other countries that continued to adhere to that doctrine. The United States continued through the 1960s to invoke absolute immunity in countries that followed that theory, despite the fact that the United States had applied restrictive immunity principles since 1952. See H.R. Rep. No. 1487, *supra*, at 9. Austria likewise was entitled to invoke sovereign immunity from claims of expropriation in United States courts until the United States provided an exception from that claim of immunity in the FSIA.[24]

* * * * *

The United States has strongly condemned the Nazi atrocities, and it has sought to rectify Nazi wrongs through diplomatic and other means. But the United States has not authorized United States courts to serve as the fora for resolving war-related claims against the governments of Germany, its Axis allies, or other nations, such as Austria, that Germany occupied during the war. In the absence of such authorization, the courts would not, on their own, have created an exception to the doctrine of absolute immunity. The court of appeals' contrary conclusion is mistaken, it departs from settled understandings in the international community, and it may have serious consequences for the United States' conduct of its foreign relations, including reciprocal treatment of the United States in foreign courts.

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[24] Austria was also entitled to invoke its right to sovereign immunity in United States courts even though Austria had enacted laws allowing respondent to litigate her takings claim in Austrian courts. A nation's waiver of its sovereign immunity in its own courts does not constitute a waiver of its sovereign immunity in another sovereign's courts. See, *e.g.*, *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

The expropriation exception of the Foreign Sovereign Immunities Act provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * * * *
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. 1605(a)(3).

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IN THE

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THE REPUBLIC OF AUSTRIA, *et al.*,
Petitioners,

v.

MARIA V. ALTMANN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE JAPAN IN SUPPORT OF PETITIONERS

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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE JAPAN IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

This case asks whether the United States will retroactively subject foreign nations to new substantive principles of sovereign immunity law in cases whose underlying events occurred long before those principles were first applied or codified.[1] Amicus curiae Japan is a sovereign foreign nation

[1] Pursuant to S. Ct. Rule 37.6, Japan notes that no part of this brief was authored by counsel for any party, and no person or entity other than Japan made any monetary contribution to the preparation or submission of the brief. Pursuant to S. Ct. Rule 37.3(a), this brief is filed with the written consent of all parties, whose letters of consent have been filed with the Clerk.

that has repeatedly been subjected to suits in this country in which such retroactive application has been sought. These have included cases in which parties have sought, decades after the fact, to impose new immunity principles on Japan in order to undo and revisit diplomatic settlements of World War II claims that were negotiated against the backdrop of prior immunity law. Japan urges the Court to hold that the substantive exceptions to immunity set forth in the Foreign Sovereign Immunities Act of 1976 ("FSIA") do not apply retroactively to cases whose underlying events occurred before those exceptions were applied or codified. But at a minimum, Japan urges the Court not to adopt any rule that could undermine the diplomatic resolution of World War II claims involving Japan and its nationals—a resolution that is the cornerstone of the enduring and productive postwar relationship between Japan and the United States.

At the conclusion of World War II, Japan entered into a comprehensive treaty with the United States and forty-four other Allied nations that expressly settled all war-related claims of the signatory nations and their nationals arising out of the actions of Japan and its nationals during World War II. *See* Treaty of Peace With Japan, Sept. 8, 1951, 136 U.N.T.S. 45 (the "San Francisco Treaty"). Among other things, the Treaty expressly waives "all * * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." *Id.* art. 14(b). Since then, Japan has once again become an accepted member of the community of democratic nations, and has proven to be one of the United States' most important and trusted allies.

In this case, the Ninth Circuit held that the Republic of Austria and one of its instrumentalities could be sued in the United States for acts that occurred in Europe during World War II and the post-war period more than half a century ago. At the time of the acts in question, foreign sovereigns were accorded "absolute" immunity from suit in the United States.

Nevertheless, the Ninth Circuit held that the expropriation exception of the FSIA—recognized for the first time upon the enactment of the FSIA—applied retroactively to deny Austria immunity here.

Japan has a direct and substantial interest in this case because other plaintiffs have repeatedly sought to impose the FSIA retroactively against Japan, including in cases involving World War II. In *Hwang Geum Joo* v. *Japan*, 332 F.3d 679 (D.C. Cir. 2003) ("*Hwang*"), a group of foreign nationals sued Japan for acts that occurred in Asia during World War II. In *Rosen* v. *Japan*, No. 01-C-6864 (N.D. Ill. 2003), former American POWs brought a putative class action against Japan for acts that occurred in Asia during World War II. And in *Lin* v. *Japan*, 1994 WL 193948 (D.D.C. 1994), plaintiffs sued Japan to recover on debts incurred by Japan in the 1920s. In each of these cases, the plaintiffs urged retroactive application of the FSIA.

In *Hwang*, the plaintiffs invoked the FSIA's commercial activity exception to sovereign immunity. *See* 28 U.S.C. § 1605(a)(2). Distinguishing the Ninth Circuit's holding in this case, the D.C. Circuit held that the FSIA did *not* apply retroactively to events that occurred before the commercial activity exception was recognized in 1952. *See* 332 F.3d at 686. As the court held, prior to 1952 "a foreign sovereign justifiably would have expected any suit in a court in the United States * * * to be dismissed unless the foreign sovereign consented to the suit." *Id.* at 683. Japan urges the Court to reach the same result in this case. But in the unlikely event the Court were to uphold the Ninth Circuit's holding here, it should make clear—as the D.C. Circuit did in *Hwang*—that a different rule should apply to cases against Japan.

STATEMENT OF THE CASE

The Evolution of Foreign Sovereign Immunity Law. For more than a century and a half, foreign sovereigns that

did not consent to jurisdiction were accorded "absolute" immunity from suit in the United States. The principle of sovereign immunity was first articulated by this Court in *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812). There, Chief Justice Marshall explained:

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station though not expressly stipulated, are reserved by implication, and will be extended to him. [*Id.* at 137.]

Over time, this Court began to view foreign sovereign immunity as a matter for judicial deference to "the practices and policies of the State Department." H.R. Rep. No. 94-1487, at 8 (1976); S. Rep. No. 94-1310, at 10 (1976). Under those practices and policies, before 1952 foreign sovereigns were invariably accorded absolute immunity by the courts of the United States in all *in personam* actions. Only in rare instances involving *in rem* proceedings against foreign vessels were foreign sovereigns denied immunity. *See, e.g.*, *The Navemar*, 303 U.S. 68, 71 (1938); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30 (1945).

In 1952, the State Department issued the so-called "Tate Letter." *See* Letter from Jack B. Tate, Acting Legal Advisor, to Acting Attorney General Philip V. Perlman (May 19, 1952), *reprinted in* 26 Dept. State Bull. 984-985 (1952). In the Tate Letter, the State Department announced a change in the United States' policy of granting immunity to foreign states. As the letter explains, the United States had long followed the "absolute" theory of immunity, under which "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *Id.* at 984. The State

Department, however, decided at that time to adopt the "restrictive" theory of immunity, under which a foreign sovereign is entitled to immunity "with regard to sovereign or public acts," but not "private," or commercial, acts. *Id.* *See Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487 (1983) (under restrictive theory, "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts").

As before, courts continued to defer to the State Department's recommendations of immunity in individual cases. Under diplomatic pressure, however, the Department often recommended immunity in cases where immunity should not have been available under the restrictive theory. Moreover, foreign nations did not always request immunity from the State Department. As a result, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations." *Id.* at 488.

In 1976, Congress adopted the FSIA to free the State Department from diplomatic pressures and to ensure a more "uniform" application of the sovereign immunity principles that had prevailed since 1952. H.R. Rep. No. 94-1487, at 7, 13; S. Rep. No. 94-1310, at 9, 12. For the most part, "the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden*, 461 U.S. at 488. Thus, under the FSIA, a foreign state is not immune from suit in the United States in any case in which the foreign state "has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1), or in certain specified cases such as those based upon "commercial activity" that has the requisite connection with this country. *Id.* § 1605(a)(2).

In addition to codifying the restrictive theory, Congress created several other new exceptions to immunity. *See, e.g.*, *id.* § 1605(a)(3), (5), § 1605(b). Of particular relevance here,

Congress established for the first time the so-called "expropriation" or "takings" exception, which denies foreign sovereigns immunity where "rights in property taken in violation of international law are in issue" in two categories of cases: (1) where the "property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," and (2) where the "property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Id.* § 1605(a)(3).

As this Court has recognized, the FSIA "provides the *sole* basis for obtaining jurisdiction over a foreign state." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (emphasis added). Under the Act, a foreign sovereign is "presumptively immune from the jurisdiction of United States courts." *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993). *See* 28 U.S.C. § 1604. "[U]nless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state." *Nelson*, 507 U.S. at 355.

Proceedings Below. Respondent brought this action against Austria and the state-owned Austrian Gallery to recover six paintings expropriated by the Nazis during World War II. Respondent sought to establish jurisdiction over Austria under the FSIA's expropriation exception. Austria moved to dismiss the action on the ground that, *inter alia*, the expropriation exception does not apply retroactively to events that occurred before 1952.

The Ninth Circuit found that Austria was subject to suit, holding that the expropriation exception applied retroactively to strip Austria of immunity for acts that had occurred more than thirty years before the exception was first recognized. The court did not "reach the broad conclusion * * * that the

FSIA may be generally applied to events predating the Tate Letter." Pet. App. 11a. Instead, the court held only that *Austria* was not entitled to immunity because—in its view—Austria could not have "legitimately expected" to receive immunity for the acts at issue here. *Id.* at 15a.

SUMMARY OF ARGUMENT

The Ninth Circuit erroneously held that the FSIA's expropriation exception applied retroactively to strip Austria of immunity for acts that occurred before 1952. Under this Court's now familiar retroactivity analysis, the Court's first task is to determine whether Congress has clearly directed that the exception be applied retroactively. As other courts have held, the FSIA lacks a "clear" indication that Congress intended the expropriation exception to apply to events preceding its enactment. To the contrary, Congress has indicated that the expropriation exception—as well as the FSIA's other original exceptions—are *not* intended to apply retroactively.

Because Congress has not clearly expressed an intent to apply the expropriation exception retroactively, the Court must determine whether applying the exception to Austria in this case would have an impermissible retroactive effect. Before 1952, foreign sovereigns were invariably granted absolute immunity in *in personam* actions. Accordingly, before 1952, a foreign sovereign would reasonably have expected to receive immunity absent consent to suit. To subject a foreign sovereign to suit for acts that occurred before 1952 "would impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns." *Hwang*, 332 F.3d at 683. Thus, applying the expropriation exception here would be impermissibly retroactive.

The Ninth Circuit's contrary conclusion was based on a misunderstanding of the principles of sovereign immunity that applied before 1952. Just as today, there was no

exception to immunity for non-"friendly" foreign sovereigns before 1952. Nor had the State Department made a determination to strip Austria of immunity in suits arising from Nazi expropriations. And the fact that Austria itself had adopted the restrictive theory before 1952 is irrelevant. The determination of whether to grant immunity to a foreign nation has never turned on the law of the foreign state.

If permitted to stand, the Ninth Circuit's decision would have serious repercussions for this Nation's diplomatic relations and international comity. After World War II, the United States adopted a policy of resolving claims for war reparations through government-to-government negotiations. That policy has proved successful, as a former adversary such as Japan is now one of this Nation's most trusted and important allies. In allowing the revival of wartime claims against another ally more than fifty years after the fact—by attempting to divine what the Truman Administration might have done in the aftermath of World War II—the Ninth Circuit's decision threatens to disrupt this Nation's current diplomatic relations.

Should this Court nevertheless hold that Austria is not entitled to immunity for the acts alleged here, the Court should narrowly confine its ruling to the facts of this case. In recently holding that the FSIA's commercial activity exception did not apply retroactively to acts allegedly taken by Japan during World War II, the D.C. Circuit expressly distinguished the Ninth Circuit's decision in this case and held that its reasoning was not applicable to Japan. As the D.C. Circuit observed, the San Francisco Treaty expressly waived "all * * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." 136 U.N.T.S. at 64, Art. 14(b). To apply the commercial exception retroactively to Japan would thus upset Japan's settled expectations. Moreover, although the Ninth Circuit misconstrued the so-called *Bernstein* letter, there is, as the

D.C. Circuit noted, no "similar statement of policy regarding the alleged acts of Japan." *Hwang*, 332 F.3d at 685. Finally, whereas Austria had adopted the restrictive theory prior to 1952, Japan had not. Accordingly, in the event the Court affirms the decision below—and it should not—the Court should make clear that its ruling is limited to the facts presented here.

ARGUMENT

I. THE FSIA'S EXPROPRIATION EXCEPTION DOES NOT APPLY RETROACTIVELY TO THE EVENTS AT ISSUE HERE.

This Court has long recognized a "presumption against retroactive legislation." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994). As the Court has explained, that presumption is "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Id.* The presumption is based on "[e]lementary considerations of fairness," which dictate that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly," and that "settled expectations should not be lightly disrupted." *Id.* As the Court has made clear, the presumption against retroactivity applies equally to jurisdictional statutes, like the FSIA, which affect not only "*where* a suit may be brought," but "*whether* it may be brought at all." *Hughes Aircraft Co.* v. *United States*, 520 U.S. 939, 951 (1997) (emphasis in original).

To determine whether a statute may be applied retroactively to events preceding its enactment, this Court follows a two-step inquiry. *See Landgraf*, 511 U.S. at 280. The Court's first task is to determine "whether Congress has directed with the requisite clarity that the law be applied retrospectively." *INS* v. *St. Cyr*, 533 U.S. 289, 316 (2001). A statute may not be applied retroactively "absent a clear indication from Congress that it intended such a result." *Id.* As this Court has emphasized, "[t]he standard for finding

such unambiguous direction is a demanding one." *Id.* " '[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was *so clear* that it could sustain only one interpretation.' " *Id.* at 316-317 (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 328 n.4 (1997)) (emphasis added) (alteration in original).

If the statute lacks the requisite clarity, the Court then considers "whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. That inquiry involves "a commonsense, functional judgment about whether the new provision attaches legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321 (quotation omitted). Here, the inquiry is straightforward: Congress did not express any clear intent to apply the FSIA retroactively, and application of the FSIA's new exceptions to immunity to cases whose underlying events occurred before those exceptions were first applied or codified would unquestionably involve an impermissible retroactive application of substantive law. Accordingly, because the new exception to immunity asserted in this case cannot be applied retroactively, the lower courts lacked jurisdiction.

A. Congress Did Not Express A "Clear" Intent To Apply The Expropriation Exception Retroactively.

The Ninth Circuit assumed, without deciding, that the FSIA lacks a "clear" indication that Congress intended the expropriation exception to apply to events preceding its enactment. *See* Pet. App. 14a. As other courts have concluded, however, the requisite clarity is lacking. *See, e.g.*, *Hwang*, 332 F.3d at 685-686 ("We find no clear indication that Congress intended [the commercial activity exception] to apply to events

occurring before 1952."); *Jackson* v. *People's Republic of China*, 794 F.2d 1490, 1497 (11th Cir. 1986) (agreeing that the FSIA "contain[s] no statement indicating that restrictive immunity was intended to apply to transactions that predate[] 1952"), *cert. denied*, 480 U.S. 917 (1987).

Indeed, Congress manifested its intent that the FSIA's expropriation exception—as well as the Act's other original exceptions to immunity—*not* be applied retroactively. Congress delayed the FSIA's effective date by ninety days "to give adequate notice of the act and its detailed provisions to all foreign states." H.R. Rep. No. 94-1487, at 33. *See* Pub. L. No. 94-583, § 8, 90 Stat. 2891, 2898 (1976). If Congress had intended for the FSIA's exceptions to apply retroactively, there would have been no reason for Congress to delay the FSIA's implementation to provide foreign states with "adequate notice" of those provisions.

Moreover, when Congress has wished the FSIA to apply retroactively, it has said so expressly. In 1996, Congress created a new exception to immunity for state-sponsored terrorism, and declared that it applied "to any cause of action arising before, on, or after the date of [its] enactment." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(c), 110 Stat. 1214, 1243. *See* 28 U.S.C. § 1605(a)(7). The absence of a similar express directive for the expropriation exception—as well as the FSIA's other original exceptions—further demonstrates that Congress never intended for those exceptions to apply retroactively. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Respondent may argue that congressional intent to apply the FSIA retroactively can be found in the FSIA's preamble, which states that "[c]laims of foreign states to immunity

should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in [the Act]." 28 U.S.C. § 1602. The FSIA's preambular language, however, "falls far short" of expressing a "clear" intent to apply the FSIA retroactively. *Hwang*, 332 F.3d at 686. In fact, because the term "henceforth" indicates prospectivity, courts have relied on that same language to infer Congress's intent not to apply the statute retroactively. *See Jackson* v. *People's Republic of China*, 596 F. Supp. 386, 388 (N.D. Ala. 1984), *aff'd*, 794 F.2d 1490, 1497 (11th Cir. 1986) (agreeing with district court's analysis of the FSIA). And as the D.C. Circuit observed in *Hwang*, "the most probable meaning" of the preamble is simply to make clear that all immunity determinations would thereafter be made by *courts* rather than by the State Department. 332 F.3d at 686.

Nor may the requisite congressional intent be gleaned from Congress's repeal, concurrent with the passage of the FSIA, of a provision conferring diversity jurisdiction in cases brought by United States citizens against foreign states. *See* 28 U.S.C. § 1332 (1976). As the D.C. Circuit held in *Hwang*, the repeal of diversity jurisdiction simply "cannot provide a basis * * * for altering sovereign immunity as it existed prior to 1952." 332 F.3d at 686. At that time, foreign sovereigns were entitled to absolute immunity. Thus, "[t]he most that can be said is that in enacting the FSIA the Congress intended to incorporate the doctrine of restrictive immunity into federal law, not that the doctrine be applied to events that occurred before the United States first adopted it." *Id.*

At best from plaintiff's perspective, Congress's intent is ambiguous. Such ambiguity, however, cannot satisfy the clear statement rule of *Landgraf* and its progeny, which requires "a clear indication from Congress that it intended [retroactivity]" through "statutory language that [is] so clear that it could sustain only one interpretation" *St. Cyr*, 533 U.S. at 316-317 (quotations and citations omitted).

B. Applying The Expropriation Exception To The Events At Issue Here Would Have An Impermissible Retroactive Effect.

Because Congress did not intend the expropriation exception to apply retroactively, the Court must determine whether application of the exception to the events at issue here would be truly retroactive, "*i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Contrary to the Ninth Circuit's holding, there should be no serious question that applying the new expropriation exception to this case would have an impermissible retroactive effect.

1. As discussed, before 1952 foreign sovereigns were invariably accorded absolute immunity in *in personam* actions. Thus, during that period a foreign sovereign would reasonably have expected to receive immunity absent consent to suit. *See Hwang*, 332 F.3d at 683 (before 1952, "a foreign sovereign justifiably would have expected any suit in a court in the United States—whether based upon a public or a commercial act—to be dismissed unless the foreign sovereign consented to the suit"). To apply an FSIA exception to immunity to events occurring before 1952 would therefore be contrary to "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Landgraf*, 511 U.S. at 270. *See Hwang*, 332 F.3d 683 ("application of the commercial activity exception to events that occurred prior to 1952 would impose new obligations upon, come without fair notice to, and upset the settled expectations of, foreign sovereigns"); *Jackson*, 794 F.2d at 1498 ("It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 by the enactment of a statute nearly three quarters of a century later.").

Moreover, as this Court has recognized, sovereign immunity is a matter of "*substantive* federal law." *Verlinden*, 461 U.S. at 493 (emphasis added). To remove immunity for pre-1952 acts would thus also "attach[] new legal consequences to events completed before [the FSIA's] enactment," and "impair rights a [sovereign] possessed when [it] acted." *Landgraf*, 511 U.S. at 270, 280. *See Jackson*, 794 F.2d at 1497-98 ("to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns"); *Carl Marks & Co.* v. *Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir.) ("a retroactive application of the FSIA would affect adversely the USSR's settled expectation, rising to the level of an antecedent right, of immunity from suit in the American courts") (quotation omitted), *cert. denied*, 487 U.S. 1219 (1988).

2. The Ninth Circuit nevertheless held that the FSIA's expropriation exception—recognized for the first time when the FSIA was enacted in 1976—applied retroactively to strip Austria of immunity for acts that occurred prior to 1952. In the court's view, applying the expropriation exception to such acts would not "impair rights [Austria] possessed when [it] acted," Pet. App. 14a (quotation omitted), because Austria could not have "legitimately expect[ed]" to receive immunity for conduct "associated with the atrocities of the War." Pet. App. 16a.

Japan knows of no case—and the Ninth Circuit cited none—in which *any* non-consenting foreign state was denied immunity prior to 1952 on that basis. Before 1952, foreign sovereigns were invariably accorded immunity in *in personam* actions, regardless of the conduct at issue. *See* 26 Dept. State Bull. at 984 ("According to the classical or absolute theory of sovereign immunity, *a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign*.") (emphasis added). *See, e.g., Wulfsohn* v. *Russian Socialist Federated Soviet Republic*, 138 N.E. 24,

25-26 (N.Y. 1923) (suit against Russia for expropriation of private property); *Sullivan* v. *State of Sao Paolo*, 122 F.2d 355, 359 (2d Cir. 1941) (suit against Brazil for principal and interest due on bonds); *Puente* v. *Spanish Nat'l State*, 116 F.2d 43, 45 (2d Cir. 1940) (suit against Spain for professional services rendered), *cert. denied*, 314 U.S. 627 (1941); *Mason* v. *Intercolonial Ry. of Canada*, 83 N.E. 876, 877 (Mass. 1908) (suit against Canadian railroad for personal injuries).

Indeed, even *after* the State Department's adoption of the restrictive theory in 1952, foreign sovereigns continued to receive immunity in cases, like this one, involving alleged expropriation of private property. *See, e.g., American Hawaiian Ventures, Inc.* v. *M.V.J. Latuharhary*, 257 F. Supp. 622, 626-627 (D.N.J. 1966) (granting immunity to Indonesia). *See also Wulfsohn*, 138 N.E. at 25 (describing government's expropriation of private property as "an exercise of sovereignty"); *Victory Transport, Inc.* v. *Comisaria General*, 336 F.2d 354, 360 (2d Cir. 1964) (immunized sovereign acts include "legislative acts, such as nationalization"), *cert. denied*, 381 U.S. 934 (1965). Foreign sovereigns also continued to receive immunity in cases "involving the exercise of the power of the police or military of a foreign state." *Nelson*, 507 U.S. at 362 n.5 (citing examples). Retroactively applying the expropriation exception to the events at issue here would thus plainly involve application of new principles of substantive law.

The Ninth Circuit's holding that Austria would not have received immunity for acts "associated with the atrocities of the War," Pet. App. 16a, echoes Judge Wald's dissent in *Princz* v. *Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995), which the Ninth Circuit found "persuasive." Pet. App. 11a. In her dissent, Judge Wald concluded that the violation of *jus cogens* norms—*i.e.*, "principle[s] of international law * * * accepted by the international community of States as a whole as a norm from which no derogation is permitted"—constitutes an

implied waiver of sovereign immunity under the FSIA. 26 F.3d at 1173 (quotation omitted). *See id.* at 1179. The *Princz* majority, however, soundly rejected that proposition, as has every other circuit court to address the question. *See id.* at 1174; *see also Sampson* v. *Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001); *Smith* v. *Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 245 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993).

As the *Princz* majority recognized, it is up to *Congress*, not the courts, to create new exceptions to immunity. 26 F.3d at 1174 n.1. *See also Hwang*, 332 F.3d at 686-687 (rejecting proposition).[2] Thus, even today there is no exception to sovereign immunity based on a court's subjective assessment of the egregiousness of the underlying conduct, yet the Ninth Circuit held that such an exception existed even when the United States accorded foreign nations "absolute" immunity. The Ninth Circuit erred as a matter of law.

3. In erroneously denying Austria immunity, the Ninth Circuit relied on a statement by this Court in *Verlinden*, *supra*, that, prior to 1952, immunity was accorded " 'in all actions against *friendly* foreign sovereigns.' " Pet. App. 14a-15a (quoting 461 U.S. at 486) (emphasis added by Ninth Circuit). The Ninth Circuit's reliance on that statement, however, does not withstand scrutiny.

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[2] The Ninth Circuit erroneously concluded that the *Princz* majority held that "application of the FSIA to pre-1952 conduct is not impermissibly retroactive." Pet. App. 11a. To the contrary, the majority specifically held that it "[did] not have to decide whether the FSIA applies to pre-1952 events." 26 F.3d at 1171. In *Hwang*, the D.C. Circuit revisited the issue and squarely held that the commercial activity exception does not apply retroactively to events occurring before 1952. *See* 332 F.3d at 686.

The reference to "friendly" foreign sovereigns first appears in this Court's jurisprudence in *The Schooner Exchange*. There, Chief Justice Marshall observed that "the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace," and held, therefore, that sovereign immunity extended to "national ships of war, entering the port of a friendly power open for their reception." 11 U.S. (7 Cranch) at 141, 145-146. In later decisions involving *in rem* proceedings against foreign vessels, the Court continued to hold that friendly foreign sovereigns were entitled to immunity. *See, e.g.*, *Hoffman*, 324 U.S. at 34 ("Ever since *The Exchange* * * *, this Government has recognized [the] immunity from suit[] of a vessel in the possession and service of a friendly foreign sovereign."); *Ex Parte Republic of Peru*, 318 U.S. 578, 588 (1943) ("courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations").

This Court's decisions thus stand for the unremarkable proposition that United States courts might not have declined to exercise jurisdiction over a vessel or other property of a foreign sovereign with which the United States was at war. But those cases do not suggest that the United States would have denied immunity in an *in personam* action against a non-friendly nation. Japan knows of *no* case prior to 1952 in which a non-friendly foreign nation was denied immunity in an *in personam* action. Indeed, in at least one case, a court *rejected* the argument that *in personam* jurisdiction could be exercised over a foreign state (Russia) because it was not "friendly" and had not been recognized by the United States. *See Wulfsohn*, 138 N.E. at 25 (distinguishing between actions involving "title to property situated within the jurisdiction of our courts" and actions where "[t]he government itself is sued for an exercise of sovereignty within its own territories").

Nor is it surprising that there would be no case denying immunity to a unfriendly nation in an *in personam* action prior to 1952. As a practical matter, an *in personam* suit could not have been brought against a warring nation until normal diplomatic relations had resumed. At that time, however, considerations of "grace and comity" would have required the State Department to recommend immunity. *Verlinden*, 461 U.S. at 486. In the absence of State Department precedent to the contrary, the courts would not have created an exception to immunity on their own. *See Hoffman*, 324 U.S. at 35 ("It is therefore not for the courts * * * to allow an immunity on new grounds which the government has not seen fit to recognize."). Notably, the FSIA contains no blanket exception for "unfriendly" nations. Once again, the Ninth Circuit would ascribe to the "absolute" theory of immunity an exception that not even the far more "restrictive" FSIA recognizes today.

4. The Ninth Circuit also mistakenly relied on the "*Bernstein* letter," invoked by the Second Circuit in *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375, 375-376 (2d Cir. 1954). *See* Pet. App. 16-18a. In *Bernstein*, the plaintiff sued a private Dutch corporation to recover commercial property originally seized by the Nazis. *See Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 173 F.2d 71, 72-73 (2d Cir. 1949). Applying the act of state doctrine, the Second Circuit refused to "pass on the validity of acts of officials of the German government." 210 F.2d at 375.[3]

[3] The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964). As this Court has recognized, the act of state doctrine and the doctrine of foreign sovereign immunity are distinct. The latter concerns a court's authority to assert jurisdiction over a foreign sovereign; the former concerns a court's authority to pass on the validity of a foreign sovereign's acts in a case properly within its jurisdiction. *See id.* at 438 (applying act of state doctrine even though foreign state had waived immunity).

In response, the State Department issued a letter announcing a policy "to relieve American courts of any restraint upon the exercise of their jurisdiction *to pass upon the validity of the acts of Nazi officials*." Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the Plaintiff in Civil Action No. 31-555 in the U.S. District Court for the Southern District of New York (Apr. 13, 1949) (emphasis added), *reprinted in Bernstein*, 210 F.2d at 376. Thus, the *Bernstein* letter concerned *solely* the act of state doctrine. *See* Letter from Legal Advisor Monroe Leigh to the Solicitor General (Nov. 26, 1975) (characterizing the *Bernstein* letter as "advis[ing] that the *act of state doctrine* need not apply to a class of cases involving Nazi confiscations") (emphasis added), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 708 (1976). The letter did not purport to address the doctrine of foreign sovereign immunity, much less announce a policy to abrogate sovereign immunity in certain cases. Indeed, if the *Bernstein* letter were intended to carve out a new exception to immunity, it is very odd indeed that the selfsame author of that letter did not mention such an exception several years later when he wrote the Tate Letter, announcing the adoption of the restrictive theory of immunity.

5. The Ninth Circuit further concluded that Austria "could have had no reasonable expectation of immunity in a foreign court" because Austria had adopted the restrictive theory of immunity before 1952. Pet. App. 19a. It does not follow, however, that Austria would not have expected immunity in the United States. Whether a foreign state is entitled to immunity from suit in the United States has *never* depended on the law of the foreign state. For instance, the Tate Letter notes that Greece had adopted the restrictive theory in the 1920s. *See* 26 Dept. State Bull. at 984. Yet,

before 1952 Greece continued to receive immunity for commercial acts. *See, e.g., The Maliakos*, 41 F. Supp. 697 (S.D.N.Y. 1941) (Greek vessel granted immunity in action on contract to recover for cargo damage). And even under the restrictive theory, expropriation of private property constitutes a "sovereign" act. *See supra* at 15. Thus, the expropriation exception to immunity was first set forth in the FSIA, long after the United States had adopted the restrictive theory.

Because—in its view—Austria had no reasonable expectation of immunity in *any* foreign court, the Ninth Circuit held that applying the FSIA in this case would not have a retroactive effect because it would " 'affect only *where* a suit may be brought, not *whether* it may be brought at all.' " Pet. App. 20a (quoting *Hughes*, 520 U.S. at 951) (emphasis in *Hughes*). The FSIA, however, "does not merely allocate jurisdiction among forums." *Hughes*, 520 U.S. at 951. "Rather, it *creates* jurisdiction where none previously existed," and thus "speaks not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* (emphasis in original). *See Verlinden*, 461 U.S. at 496-497 (FSIA "does not merely concern access to the federal courts[, but] * * * codifies the standards governing foreign sovereign immunity as an aspect of *substantive* federal law") (emphasis added). *See also Hwang*, 332 F.2d at 684 (FSIA's commercial activity exception, "by qualifying what previously had been the absolute immunity of foreign sovereigns, * * * 'creates jurisdiction where none previously existed' "). Thus, contrary to the Ninth Circuit's conclusion, applying the FSIA in this case would not " 'merely * * * regulate the secondary conduct of litigation,' " but rather " 'the underlying *primary* conduct of the parties.' " Pet. App. 20a (quoting *Hughes*, 520 U.S. at 951) (emphasis added).

Finally, the Ninth Circuit also held that, even if Austria had an expectation of immunity from suit for the acts alleged here, such an expectation "would be due no deference." Pet.

App. 21a. In the Ninth Circuit's view, the presumption against retroactivity only applies in cases involving contracts or other financial transactions, and not "in the context of a claim like the international takings violation at issue here." *Id.* The Ninth Circuit cited no authority for this novel theory, which is in fact directly contradicted by *Hughes*, *supra*, a case on which the Ninth Circuit relied. *See id.* at 20a. There, this Court held that the presumption against retroactivity applied even though the wrongful conduct at issue was fraud. *See* 520 U.S. at 945, 951. Because Austria's settled expectations are entitled to the same deference as any other, the Ninth Circuit erred in retroactively applying the FSIA to deny Austria of immunity in this case.

C. Retroactive Application of New Exceptions to Immunity Would Undermine This Nation's Diplomatic Relations and International Comity.

In addition to the unfairness that exists any time a party is subjected to retroactive liability, retroactive application of new principles of sovereign immunity would have severe consequences for this Nation's diplomatic relations. Japan's circumstances demonstrate why this is so. After World War II, the United States recognized that it would be impossible for Japan to make full reparation for the damage that its former military had caused. The United States was also determined not to repeat the mistakes of the Treaty of Versailles, whose onerous reparations provisions were believed to have led directly to the rise of fascism in Europe. Accordingly, the United States adopted a policy of resolving all Japanese war claims through government-to-government negotiations, with the goal of reintegrating Japan into the community of democratic nations without imposing crushing financial liability. *See generally Mitsubishi Materials Corp.* v. *Superior Court*, 2003 WL 22504961, at *5-*7 (Cal. Ct. App. Nov. 5, 2003); *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 946-947 (N.D.

Cal. 2000), *aff'd on other grounds*, 324 F.3d. 692 (9th Cir.), *cert. denied*, 124 S. Ct. 105 (2003).

The San Francisco Treaty was the culmination of this policy. The Treaty imposed significant financial obligations on Japan, which was required to forfeit substantial assets held by its government and nationals in formerly occupied territories and to meet various other obligations. But the Treaty also explicitly waived all claims "arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." 136 U.N.T.S. at 64, Art. 14(b). And the Treaty furthermore made clear that the claims of nationals whose countries were not able to sign the San Francisco Treaty (including China and Korea) would similarly be resolved through government-to-government negotiations. *Id.* at 50, Art. 4(a). As the D.C. Circuit has held, as a result of the Treaty

> Japan could not have expected to be sued in a court of the United States by either an Allied national or a Chinese or Korean national for a claim arising out of World War II because the Allied Powers had respectively waived the claims of their nationals and expressed a clear policy of resolving the claims of other nationals through government-to-government negotiation." [*Hwang*, 332 F.3d at 685.]

The policy embodied in the Treaty has been extraordinarily successful, as Japan has once again become a productive and peaceful member of the international community and one of this country's strongest allies.

Now, more than fifty years after the fact, plaintiffs have sought to use the United States courts to revisit and undo that policy by litigating war claims long ago resolved through diplomatic negotiation. To do so, they have sought to impose new principles of sovereign immunity retroactively to strip Japan's immunity from suit. But the diplomatic resolution of the war with Japan—which mandated government-to-

government negotiations rather than individual claims—was necessarily negotiated against the backdrop of the prevailing absolute immunity principles of the time and cannot be divorced from them. To now subject Japan to suit in the courts of this country based on new conceptions of immunity that did not exist before 1952 would disrupt the settled expectations of both Japan and the United States, and call into question the settlement of World War II that is the foundation of the enduring postwar alliance between those two nations.

The practical implications of the Ninth Circuit's rule would likewise disrupt international comity. That rule requires a court to hypothesize what position the State Department might have taken if a case had been brought against an a foreign nation in the aftermath of a conflict that ended long ago. *See also Abrams* v. *Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173, 187-188 (2d Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3154 (Aug. 19, 2003) (No. 03-284). The result is that a current case was decided against Austria—a friendly ally—based on the Ninth Circuit's speculation that the Truman Administration would not have approved immunity. As shown above, the proper resolution is to recognize that the absolute immunity prevailing before 1952 was, in fact, absolute. But to the extent there is any question regarding the application of pre-1952 law to a current case, those questions should be resolved based on the Executive's understanding of our Nation's current relations with a foreign government and the effect of a current lawsuit on that international comity—not on judicial conjecture about our relations with a former regime years ago. *Cf. Princz*, 26 F.3d at 1174 n.1 (declining to create new immunity exception because "[i]n many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is"):

II. IF THE COURT HOLDS THAT AUSTRIA IS NOT ENTITLED TO IMMUNITY, THE COURT SHOULD CAREFULLY LIMIT ITS HOLDING TO THE FACTS OF THIS CASE.

As noted, the D.C. Circuit recently held that the commercial activity exception does not apply retroactively to acts occurring before 1952 and that Japan was thus entitled to immunity for acts occurring during World War II. *See supra* at 3. In so holding, the court specifically distinguished its decision from the Ninth Circuit's decision in this case, holding that "[w]e do not find [the Ninth Circuit's] reasoning applicable to this case." *Hwang*, 332 F.3d at 684. For the reasons set forth above, the Ninth Circuit erred in holding that Austria was not entitled to immunity in the circumstances of this case. Nevertheless, in the event this Court affirms the Ninth Circuit's ruling—and it should not—the Court should make clear that such reasoning does not apply in different circumstances such as those involving Japan.

First, the 1951 San Francisco Treaty expressly extinguished "all * * * claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war." 136 U.N.T.S. at 64, Art. 14(b). As the D.C. Circuit explained, the treaty "embodies the foreign policy determination of the United States that *all* claims against Japan arising out of its prosecution of World War II are to be resolved through intergovernmental settlements." *Hwang*, 332 F.3d at 684 (quotation omitted; emphasis added). Thus, the retroactive application of the FSIA to claims arising out of any actions taken by Japan during World War II would clearly upset Japan's settled expectations, regardless of its effects on the expectations of other nations.[4] In distinguishing the Ninth

[4] In fact, the D.C. Circuit's ruling on the meaning and effect of the San Francisco Treaty provides a separate alternative basis for the court's holding, in addition to foreign sovereign immunity.

Circuit's decision below, the D.C. Circuit concluded that "there was no similar treaty with Germany or Austria, and therefore no similar settled expectation." *Id.* at 685.[5]

Second, the decision below involves the expropriation exception, whereas *Hwang* involves the commercial activity exception. The Ninth Circuit held that the expropriation exception applied retroactively in this case in part because—in its view—the *Bernstein* letter announced a policy to strip Austria of immunity for Nazi expropriations of private property. *See* Pet. App. 16-18a. Although Japan believes that the Ninth Circuit's reliance on the *Bernstein* letter was erroneous for the reasons discussed above, *see supra* at 18-20, as the D.C. Circuit has held there is no "similar statement of policy regarding the alleged acts of Japan." *Hwang*, 332 F.3d at 685. As the D.C. Circuit furthermore observed, "[t]he lack of such a statement not only distinguishes this

[5] The United States did enter into treaties with Germany and Austria providing for the restitution of certain confiscated property. *See, e.g.*, State Treaty for the Reestablishment of an Independent and Democratic Austria, 6 U.S.T. 2408, 2435-36, Art. 26 (May 15, 1955) (providing for return by Austria of all property confiscated on account of the racial origin or religion of the owner); Convention on the Settlement of Matters Arising out of the War and the Occupation, 6 U.S.T. 4411, 4452-61 (Oct. 23, 1954) (providing for restitution of property by Germany to victims of Nazi oppression). Those treaties also embody the Executive Branch's foreign policy determination that such expropriation claims are matters to be resolved through government-to-government negotiations, not private litigation. *See American Ins. Ass'n* v. *Garamendi*, 123 S. Ct. 2374, 2390 (2003) ("The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century"). Thus, although the San Francisco Treaty leaves no doubt that Japan's settled expectations would be disrupted by retroactive application of the FSIA, the retroactive application of the expropriation exception in this case would in fact upset Austria's settled expectations as well.

case from *Altmann*; it also gives us all the more reason to believe the Executive wanted to handle claims against Japan arising out of World War II solely at the level of inter-governmental negotiations." *Id.*

Finally, the Ninth Circuit relied in part on the fact that "Austria itself had adopted the restrictive theory" prior to 1952. Pet. App. 19a. As noted above, the Ninth Circuit erred in relying on foreign law, which has never been relevant in determining whether to grant sovereign immunity. *See supra* at 20. Nevertheless, the same document that establishes that Austria had adopted the restrictive theory before 1952—the Tate Letter—also makes clear that by that time Japan had not. *See* 26 Dept. State Bull. at 984. As the Tate Letter notes, in 1952 Japan still adhered to the absolute theory of immunity. Thus, to the extent the retroactivity of the FSIA's immunity exceptions turns whether a nation had adopted the restrictive theory before 1952, that factor requires non-retroactivity with regard to Japan.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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IN THE

United States Supreme Court

REPUBLIC OF AUSTRIA ET AL.,

Petitioner,

v.

MARIA V. ALTMANN,

Respondent.

On Appeal from the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The *Amicus* is the United Mexican States ("Mexico"). As a friendly foreign sovereign with extensive diplomatic, political, economic and social relations with the United States, Mexico has a significant interest in the United States' law governing foreign sovereign immunity. Indeed, because of the long history of cooperation between our two nations, Mexico is particularly affected by any change of what had been a bedrock principle of foreign sovereign immunity law before the Ninth Circuit issued *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002), *op. amended*, 327 F.3d 1246 (9th Cir. 2003)—that the exceptions to foreign sovereign immunity set forth in the Foreign Sovereign Immunities Act of 1976 ("FSIA") do not apply retroactively to conduct that occurred before the United States adopted the "restrictive theory" of sovereign immunity in 1952.

Mexico's interest in the proper resolution of this case is not theoretical. Mexico has been sued in recent years in the United States for alleged conduct that occurred entirely prior to 1952. *See Cruz v. United States of Am.*, 219 F. Supp. 2d 1027 (N.D. Cal. 2002) ("*Cruz I*") (dismissing claims against Mexico and Mexican state instrumentalities by Mexican nationals who worked as migrant laborers in the United States during World War II under international agreements between Mexico and the United States, on grounds of absolute foreign sovereign immunity). Indeed, after the *Altmann* decision, Mexico was forced to relitigate the issue of its immunity for pre-1952 events under the amorphous retroactivity standard that the Ninth Circuit adopted. *See Cruz v. United States of Am.*, Nos. C 02-1942-CRB, C 02-1943-CRB, C 02-1944-CRB, C 01-

00892-CRB, 2003 U.S. Dist. LEXIS 10948 at *10-11 (N.D. Cal. June 20, 2003) ("*Cruz II*") (finding that, even under the *Altmann* standard, Mexico was entitled to absolute immunity). Other sovereigns are likewise still facing such suits. *See, e.g., Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003).[1]

SUMMARY OF ARGUMENT

Altmann erred in applying the restrictive theory of sovereign immunity embodied in the FSIA retroactively to conduct that occurred before the United States adopted that theory in 1952. To be sure, *Altmann* did not embrace wholesale retroactivity. *Altmann*, 317 F.3d at 962-67. But it instead adopted an amorphous, subjective and inherently uncertain totality-of-the-circumstances standard that would afford immunity to pre-1952 acts, except where the foreign state could not have "reasonably expect[ed]" such immunity at the time of those acts. *Id.* at 965. In doing so, it abandoned settled sovereign immunity law and replaced it with an uncertain, difficult to apply standard that exposes foreign states to the possibility of suit (and at a minimum, complicated motion practice) in the United States over events that by definition are more than half a century old.

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court. No party to this action or their counsel authored this brief, in part or in whole. No person or entity other than the *amicus curiae* made a monetary contribution to its preparation or submission. In submitting this *amicus* brief, Mexico of course does not waive its immunities under United States or international law, including the FSIA.

The Ninth Circuit decision set no limits and identified no priorities among the sorts of facts that could be considered in the application of its "reasonably expected" standard. Rather, it considered various decades-old events, academic articles, international legal pronouncements, U.S. State Department press releases, and legal treatises discussing Austrian law, all in the dubious exercise of trying to recreate the expectations of long-dead Austrian officials half a century earlier. Other courts trying to apply *Altmann* have perforce engaged in the same fact-intensive analysis. *See Joo*, 332 F.3d at 679 (engaging in extensive factual analysis applying *Altmann* to case involving Japan); *Cruz II*, 2003 U.S. Dist. LEXIS 10948, at *3 (same, in case involving Mexico).

This exercise invites uncertainty and is calculated to lead to unpredictable, if not idiosyncratic results. While states like Mexico clearly had a "reasonable expectation" of immunity from suit in the United States before 1952, *see Slade v. United States of Mexico*, 617 F. Supp. 351, 358 (D.D.C. 1985), *aff'd*, 790 F.2d 163 (D.C. Cir. 1986); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987), retroactivity analysis should not turn on historical reconstruction of the understandings of particular foreign states in particular fact patterns. The Court should therefore follow its established rule that new statutes are presumed not to apply retroactively to impair substantive rights, reverse *Altmann* and reaffirm the previously well-settled law of immunity for foreign states from *in personam* suit in the United States without their consent for pre-1952 events.

To the extent the Court does not do this, it should at least reject the amorphous retroactivity analysis of *Altmann* in favor of a clear and more easily applicable standard: that foreign sovereigns are presumptively afforded absolute immunity for their pre-1952 acts, which presumption can be overcome only if the plaintiff shows that at the time of those acts, the United States Executive Branch had clearly and publicly announced it would not support immunity for them. A test looking exclusively to the contemporary, published statements of the Executive Branch with respect to immunity for the conduct at issue would be consistent with pre-1952 practice, because the courts before 1952 uniformly deferred to the Executive Branch's recommendations with regard to foreign sovereign immunity. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Moreover, because the State Department's published statements regarding immunity determination are easily ascertainable, this standard would restore at least a degree of the certainty that *Altmann* disrupted in this area of the foreign relations law of the United States.

Certainly, the Court should go no farther than *Altmann*, and should not apply the FSIA generally to pre-1952 conduct. *Altmann* retroactively applied the FSIA only in the unique circumstances of that case, which involves the alleged theft of Jewish-owned art by Nazi-controlled Austria during the Holocaust era. Even *Altmann*'s "reasonable expectation" standard did not question that as a general matter—absent these extraordinary facts—the FSIA does not apply to pre-1952 conduct. *Altmann* could not have plausibly suggested otherwise, as the overwhelming authority from this Court and elsewhere demonstrates that friendly foreign sovereigns would have reasonably expect-

ed to be afforded immunity before 1952. It would turn the presumption of non-retroactivity on its head if the Court were to retreat from this general rule. At most, *Altmann* should remain an isolated exception to the non-retroactivity of the FSIA.

ARGUMENT

POINT I

THE COURT SHOULD REVERSE *ALTMANN* AND REAFFIRM THAT THE FSIA DOES NOT RETROACTIVELY APPLY TO PRE-1952 CONDUCT

Altmann's application of the restrictive theory of sovereign immunity embodied in the FSIA to conduct that occurred before the United States adopted that theory should be rejected.

Prior to the adoption of the "restrictive" theory of sovereign immunity by the "Tate letter" of 1952, foreign sovereigns were generally afforded immunity from suit in the courts of the United States. *See, e.g., Verlinden*, 461 U.S. at 486 (noting that the State Department generally requested and the courts "generally granted foreign sovereigns complete immunity from suit" before the 1952 Tate Letter); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698 (1976) ("in 1952, as evidenced by Appendix 2 (the Tate letter) attached to this opinion, the United States abandoned the absolute theory of sovereign immunity"); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943) (holding that the Court has no jurisdiction over Peru unless Peru waived its immunity); *Oliver Am. Trading Co. v. United States of Mexico*, 264 U.S. 440, 442 (1924) ("Mexico was entitled to

immunity from suit in the Courts of the United States of America, unless upon its own consent . . . .”). Indeed, as the Court in *Verlinden* explained, these pre-1952 cases “came to be regarded as extending virtually absolute immunity to foreign sovereigns.” *Verlinden*, 461 U.S. at 486.

Foreign states dealing with the United States before 1952, as Mexico did when it entered into the wartime international agreements with the United States that gave rise to the claims against it in *Cruz*, justifiably relied on this jurisprudence. Certainly, Mexico would have been reluctant to make these agreements with the United States, which were of major importance to the United States war effort, *Cruz I*, 219 F. Supp. 2d at 1031, if it had been aware that to do so would expose it to suit in the United States as a result of a subsequent change in United States law. It is the function of the doctrine of non-retroactivity to protect against such after-the-fact deprivation of a party’s rights.

The courts have therefore refused to apply the FSIA, which codified the restrictive theory of immunity, to pre-1952 events. *Jackson*, 794 F.2d at 1497-98 (application of the FSIA to pre-1952 events “would interfere with antecedent rights of other sovereigns”); *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 665 F. Supp. 323 (S.D.N.Y. 1987), *aff’d*, 841 F.2d 26 (2d Cir.), *cert. denied*, 487 U.S. 1219 (1988). As the court held in *Slade*, 617 F. Supp. at 358, applying the FSIA retroactively would “clearly prejudice the antecedent rights of Mexico” [because] between 1922 and 1951, the government of Mexico could safely assume that the then existing doctrine of absolute immunity governed . . . .”

As the Eleventh Circuit in *Jackson* explained, fairness and principles of non-retroactivity demand that courts continue to respect the settled expectations of immunity of foreign sovereigns before 1952:

> [T]o give the [FSIA] retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns (and also with antecedent principles of law that the United States followed until 1952). It would be manifestly unfair for the United States to modify the immunity afforded a foreign state in 1911 [at the time of the alleged conduct in *Jackson*] by the enactment of a statute nearly three quarters of a century later.

Jackson, 794 F.2d at 1497-98. Indeed, this Court has repeatedly reaffirmed that the presumption against retroactive legislation is “deeply rooted in our jurisprudence.” *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997).

In the face of this authority—defying presumptions in favor of sovereign immunity, *see Verlinden*, 461 U.S. at 493, and non-retroactivity, *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)—*Altmann* applied the FSIA’s expropriation exception to alleged conduct by Austria pre-dating 1952. *Altmann* thus stripped a foreign state of a defense to suit for conduct that was not subject to suit at the time it occurred. That altered Austria’s antecedent rights. *See Hughes Aircraft*, 520 U.S. at 951 (“The 1986 amendment [of the False Claims Act] does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the sub-

stantive rights of the parties as well. Such a statute, even though phrased in 'jurisdictional' terms, is as much subject to our presumption against retroactivity as any other.").

The Ninth Circuit's holding cannot be squared with *Hughes Aircraft*. The Tate Letter effectively altered the United States law of sovereign immunity and therefore the *substantive* rights of affected parties.[2] Under the Court's retroactivity doctrine, the FSIA's codification of the Tate Letter cannot be applied retroactively to conduct that predated this change in law.

[2] Because Congress did not legislate with respect to foreign sovereign immunities issues until the FSIA in 1976, the law of sovereign immunity up to that time was what was declared by the federal courts. The courts in turn, having recognized at an early date the principle of absolute immunity, *see Schooner Exchange v. McFaddon*, 7 Cranch 116, 136, 3 L. Ed. 287 (1812) (Marshall, C. J.), followed the lead of the Executive Branch, which routinely requested immunity in *in personam* suits against friendly foreign states until the announcement of the change in the Executive Branch's policy in 1952. The Executive Branch's policy and the courts' application of it (which included interpreting the doctrine of absolute immunity in cases where the Executive Branch did not file a suggestion of immunity) constituted the pre-1952 "common law" of foreign sovereign immunity.

POINT II

ANY EXCEPTION TO NON-RETROACTIVITY OF THE FSIA FOR PRE-1952 EVENTS SHOULD BE LIMITED TO SITUATIONS WHERE THE EXECUTIVE BRANCH, AT THE TIME, PUBLICLY DECLARED THAT IMMUNITY SHOULD NOT BE AFFORDED

If the Court were to sanction some exception to non-retroactivity, it should at least adopt a more practicable rule. *Altmann*'s focus on whether Austria in the 1940s had a "reasonable expectation" of immunity on the particular facts of that case is vague, subjective, and difficult to apply. Indeed, as the cases following *Altmann* demonstrate, this standard leads to highly fact-intensive litigation—the practicability of which depends on the quality of the historical record—as the parties and the court attempt to recreate what the foreign state might have reasonably expected many years ago. *Joo*, 332 F.3d at 683-84; *Cruz II*, 2003 U.S. Dist. LEXIS 10948, at *11.

An approach that is much more certain, is easily applied and would comport with pre-1952 practice would be to afford immunity to foreign states for pre-1952 conduct unless the plaintiff can show that the U.S. Executive Branch, at the time of the specific conduct at issue, had expressly and publicly announced it would not support sovereign immunity for the state that engaged in it. This rarely, if ever, occurred, precisely because it was the policy of the United States to afford absolute immunity to friendly foreign states.

This rule would zero in on the key factor in pre-Tate Letter practice, because the courts uniformly deferred to the Executive Branch before 1952 on questions of sovereign immunity. *Verlinden*, 461 U.S. at 486 (finding that the courts before 1952 generally deferred "to the decisions of the political branches-in particular, those of the Executive Branch-on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."); *Ex Parte Republic of Peru*, 318 U.S. at 586-87 ("The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State."); *Compania Espanola De Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) (Noting that it is the duty of the courts to uphold a foreign state's claim of immunity "if the claim is recognized and allowed by the Executive Branch of the government . . . ."); *United States v. Lee*, 106 U.S. 196, 209 (1882) ("In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."). This rule would also be practicable, because whether the Executive Branch published a clear statement that immunity should be denied to particular conduct by a particular foreign state is easily ascertainable.

POINT III

AT MOST, THE COURT SHOULD TREAT *ALTMANN* AS A LIMITED EXCEPTION TO NON-RETROACTIVITY

If the Court were to uphold *Altmann* in any way, Mexico respectfully urges the Court to recognize the expressly limited nature of that decision and leave intact the general rule that friendly sovereigns are entitled to immunity for their pre-1952 acts.

Altmann was a limited, fact-specific ruling. The Ninth Circuit specifically refrained from considering whether the FSIA generally applies retroactively. *Altmann*, 317 F.3d at 962. Rather, all that the court considered in *Altmann* was whether the Republic of Austria was entitled to immunity in light of the egregious allegations in that case, i.e., "its alleged complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life" during the Nazi period. *Id.* at 964. The Ninth Circuit found that Austria could not have legitimately expected to be afforded immunity in these circumstances and that applying restrictive immunity to such conduct for which the sovereign never reasonably expected to be afforded immunity "infringes on no right held at the time the acts at issue occurred." *Id.* at 966. The court's findings in this regard could not have been more fact-specific:

1. The critical consideration for the court was the "international takings violation at issue." *Id.* at 967. As the court explained:

> Mindful that such seizures explicitly violated both Austria's and Germany's obligations under the Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, and that Austria's Second Republic officially repudiated all Nazi transactions in 1946, we hold that Austria could not expect such immunity.

Id. at 965.[3] The court took pains to distinguish this conduct from the sort of "economic transactions" that formed the basis of *Carl Marks*, *Slade*, and other cases that refused to apply the FSIA retroactively to pre-1952 conduct. *Id.* at 967.

2. The Ninth Circuit also found that the alleged conduct in Altmann was perpetrated by and in support of the actions of a wartime enemy of the United States. *Id.* at 964. Indeed, the court concluded that Austria could not reasonably have expected immunity for acts taken in concert with the Nazis or otherwise "closely associated with the atrocities of the War." *Id.* at 965. And the court cited U.S. State Department press releases suggesting that it was "this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution . . . [and to] relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." *Id.* at 965.

3. Moreover, the Ninth Circuit considered that "[a]t the end of World War I, the courts of Austria abandoned the absolute concept [of sovereign immunity] and adopted

[3] Mexico takes no position on whether the Ninth Circuit's assessment in this or other regards was legally or factually correct, but simply details the specific considerations relied on by the court to demonstrate the narrowness of the ruling.

the restrictive concept." *Id.* at 966 (citing Joseph M. Sweeney, *The International Law of Sovereign Immunity* 30 (U.S. Department of State Policy Research Study, 1963)).

Only based on all these specific findings and others did the Ninth Circuit conclude that "Austria could have had no reasonable expectation of immunity in a foreign court" and that the court's newly created exception to non-retroactivity applied. *Id.* The court expressly disclaimed any broader ruling outside the limited facts of this case and retreated from the district court's original ruling that the FSIA generally applies to pre-1952 conduct. *Id.* ("We need not reach the broad conclusion of the district court that the FSIA may be generally applied to events predating the 1952 Tate Letter.").

Even if this Court were to affirm this narrow decision—and sanction the Ninth Circuit's amorphous "reasonable expectation" standard—there is no basis to expand the decision to deprive sovereigns generally of immunity for pre-1952 acts. Indeed, far from alleged crimes by a wartime enemy, the overwhelming majority of cases implicating the non-retroactivity of the FSIA have involved either commercial, *e.g.*, *Jackson*, 794 F.2d at 1497-98 (suit against Chinese Government for payment of defaulted bearer bonds); *Carl Marks*, 665 F. Supp. at 323 (lawsuit to recover alleged interest owed on bonds); *Slade*, 617 F. Supp. at 358 (suit against Mexico to recover interest allegedly owed on certain receipts), or normal governmental pre-1952 activities of *friendly* nations. *Cruz I*, 219 F. Supp. 2d at 1031 (involving claims by Mexicans against Mexico for wage deductions payable in Mexico, under a government migrant labor program created by World War II interna-

tional agreements between Mexico and the United States, the purpose of which was to support the United States' war effort by temporarily supplying needed farming labor in the United States).

The concerns discussed by the Ninth Circuit in *Altmann* have no bearing on these thankfully more common sorts of cases. Certainly, these cases raise no "international takings" issue. And they implicate no conduct by a wartime enemy of the United States, much less conduct that was allegedly part of the crimes of the Nazi regime. The sovereigns in these cases and others simply had no reason to doubt at the time of their alleged conduct that the United States' "century and a half"-old policy of "complete immunity," *Verlinden*, 461 U.S. at 486, would be afforded to them if they were sued in the United States. Indeed, *Altmann* itself acknowledges that *friendly* sovereigns were traditionally entitled to absolute immunity. *See Altmann*, 317 F.3d at 962. Thus, *Altmann*, if not reversed outright, should be limited to the extraordinary circumstances that gave rise to it. In all other respects, the Court should reaffirm the non-retroactive application of the FSIA.

CONCLUSION

For the foregoing reasons and those expressed in Austria's brief, Mexico respectfully submits that the Court should answer the question accepted for review in the negative, and reverse *Altmann*. Alternatively, Mexico urges the Court to issue a ruling consistent with the points expressed above.

Respectfully submitted,

JONATHAN I. BLACKMAN
Counsel of Record
JUSTIN S. ANAND
KATHERINE E. JOHNSON
CLEARY, GOTTLIEB, STEEN & HAMILTON
Counsel for Amicus
One Liberty Plaza
New York, NY 10006
(212) 225-2000

Dated: New York, New York
November 14, 2003

Appendix 8

The Honorable
Irving M. Ives,
United States Senate

Appendix 9 — *Memorandum of Conversation, May 19, 1958, reprinted in For. Rel. 1958-1960*, (1993), IX, 769-70

MEMORANDUM OF CONVERSATION

DATE: May 19, 1958

SUBJECT: Article 26 Claims

PARTICIPANTS:

Austria

His Excellency, Julius Haab, Chancellor of Austria
His Excellency, Dr. Wilfried Platzer, Ambassador of Austria
The Honorable Dr. Friedrich Meznik, Chief of the Press Bureau, Austrian Federal Chancellery
Dr. Paul Zedtwitz, Counselor, Embassy of Austria
Dr. Erich Haider, Special Assistant to the Chancellor

United States

The Secretary
Mr. H. G. Torbert, Jr., Director, Western Europe
Mr. R. D. Kearney, Assistant Legal Adviser, European Affairs
Mr. F. L. Chapin, Austrian Desk

Chancellor Raab said that the Austrian Government had already agreed to pay 550 million schillings or approximately $21 million, for the Jewish Aid Fund which had been set up several years ago. Then the Jewish groups had made

additional claims based on Article 26. He had agreed to see the Jewish leaders on May 20 and would see what could be done about settling the claims. There had to be some end, however, to the claims.

The Secretary said that the United States had proposed a formula for settlement of the claims which would result in the payment of approximately $5 million or less than $200 each for the 30,000 claimants around the world. He scarcely needed to recall to the Chancellor the large measure of sympathy in the United States for the claimants. He believed it would be an advantage to Austria to settle the matter; he was glad that the Chancellor was meeting with a delegation of Jewish leaders; and he hped that the Chancellor would be able to give them some satisfaction.

Chancellor Raab

Chancellor Raab inquired about the $5 million figure and was informed that it represented the United States estimate of the total of all categories of claims. If the negotiations now in progress between the two governments resulted in a satisfactory settlement, the United States would be prepared to deliver a formal note stating that the United States would no longer intervene diplomatically on behalf of claimants under Article 26. Chancellor Raab broke in to say that Austria was ready to settle the claims under Article 26 and reiterated there must be an end to the Jewish claims. The Secretary pointed out that the settlement would eliminate further representation by the United States Government, but the Government could not prevent private persons from

advancing claims or arguing with the Austrian Government. The important thing would be that the United States would not support any such action after a satisfactory settlement was reached.

Chancellor Raab said that he would be glad to look into the negotiations and see what could be done about them. Austria was drafting war damage compensation laws, and the Jewish emigrants would be treated in the same manner as Austrian nationals in Austria with regard to any such compensation.

Appendix 10 — Memorandum from Ely Mauer to Mr. Nager, Nov. 28, 1960; ACT OF STATE, Record Group 59/ 250/67/03/07; National Archives, Silver Spring, Maryland

To: L – Mr. Hager

From: L/E – Ely Maurer

Subject: Background to Department Issuance of the "Bernstein Letter".

You have asked that I furnish you with a memorandum setting out the background of the Department's issuance of the so-called "Bernstein letter". This was the letter of April 13, 1949 from Mr. Tate, Acting Legal Adviser, to Bennet, House & Courts, attorneys for Bernstein in the case of *Bernstein v. N.V. Nederlandsche-Amerikaanach, etc.* (Holland-America Line), then pending in the New York federal courts. The letter is attached (Tab A).

The background is best set forth in narrative fashion. I think that the most important point to notice is that the letter was issued as the culmination of an already matured and enunciated Department policy which had been developing over a period of years with respect to this particular problem of the recognition of German confiscatory and discriminatory laws, decrees and acts.

A. *Previous Governmental Actions*

The Executive Branch had participated in or issued, during the period 1943 to 1947, a number of declarations, statements, directives, and military government laws condemning the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the

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Germans on the countries or peoples subject to their control. These are referred to in paragraph 1, items (a) through (h) of the "Bernstein letter".

Two of these items might be described briefly. The first one is the Inter-Allied Declaration on Axis Acts of Dispossession which was issued in London in January, 1943 by 18 Allied countries, including the United States. The Declaration issued a warning to present and future holders of such property that the Governments involved intended to defeat the Axis dispossessions of property and reserved all rights to invalidate any transfers of such property. The Declaration reads in relevant part:

> "The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece; India; Luxemburg; the Netherlands; New Zealand; Norway; Poland; the Union of Soviet Socialist Republics; Yugoslavia; and the French National Committee:
>
> "Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

"Accordingly, the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected. . . ."

The second item is Military Government Law No. 59 on the Restitution of Identifiable Property which was issued by the U.S., U.K. and France in Germany in November, 1947. This law provided for the undoing of forced transfers and the restitution of identifiable property to persons wrongfully deprived of such property within the period from 1933 to 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. Restitution was to take place, in general, despite the existence of purchasers in good faith.

B. *Return of Vested Property by Office of Alien Property*

The general problem involved in the Bernstein cases first arose for the Department in 1945 in the context of the work of the OAP, which had been seizing German assets. The

Germans had, of course, either under the purported authority of their confiscatory or discriminatory laws, or without the benefit of such laws, seized large amounts of property from peoples subject to their control, and particularly from persons of the Jewish faith. The questions thus arose as to whether the OAP should retain such property as against the original owners on the basis that the property had, through seizure by the German Government, become "German". In addition, there was the question of returning property seized by the OAP which belonged to "technical" enemies, that is, persons who were located in areas conquered by the Germans. Thus, in a letter (Tab B) of June 29, 1945 to Congressman Sumners, Chairman of the House Committee on the Judiciary, signed jointly by the Acting Secretary of State (Grew), the Attorney General (Biddle), and the Alien Property Custodian (Markham), legislation was proposed to permit the return of such property. This letter stated:

"The President, or such officer or agency as he may designate, would be required, before making any return of property, to determine that the claimant had owned the property immediately prior to vesting. It is contemplated that in determining who was the actual owner at that time, consideration will be given to the question whether any property claimed had been transferred to enemy ownership under duress. If such were the case the non-enemy who was forced to make the transfer would normally be recognized as the true owner immediately prior to vesting."

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Congressman Sumners on July 10, 1948 introduced a bill, H.R. 3750, reflecting the views of the Administration. Hearing were held on the bill and then a new bill was introduced, H.R. 4571, on December 4, 1951, in substitution of H.R. 3751, and containing certain changes not pertinent here. This bill was enacted into law March 8, 1946 (P.L. 322, 79th Cong., 2d Sess., C. 83) as an amendment to Section 32 of the Trading with the Enemy Act. Section 32(a)(1), which is pertinent here, reads as follows:

> "SEC. 32. (a) The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine —
>
> "(1) that the person who has filed a notice of claim for return, in such form as the President or such officer or agency may prescribe, was the owner of such property or interest immediately prior to its vesting in or transfer to the Alien Property Custodian, or is the legal representative (whether or not appointed by a court in the United States), or successor in interest by inheritance, devise, bequest, or operation of law, of such owner; and . . ."

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In the House and Senate Reports on the bill appears this statement (H. Rept. 1269, 79th Cong., 1st Sess., p. 4; S. Rept. 920, 79th Cong., 2d Sess., pp. 3-4):

> "In construing who was the 'owner' immediately prior to vesting, acts of enemy governments which sought to divest nonenemies of their property or rights, either directly or by purported confiscation or by the exercise of duress upon the owner, would be ignored and the victim of such an act would be regarded as the 'owner' for purposes of this statute."

In addition, the OAP requested a statement of policy by the Department of State with respect to Section 32(a)(1) and a letter (Tab C) was transmitted to the Alien Property Custodian (Markham) by the Under Secretary of State (Acheson) on March 15, 1946 confirming the construction of Section 32(a)(1) reflected in the Congressional Reports.

It should be pointed out that this construction of Section 32 covered property which had been in Germany at the time of confiscation and had later come to the United States, as well as property which had been in the U.S. at the time of the confiscation.

C. *Bernstein I case.*

Subsequent to this development the first *Bernstein* case was decided by the Court of Appeals for the Second Circuit.

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Bernstein was the sole owner of several shipping companies, the Arnold Bernstein Line and the Red Star Line. He was of the Jewish faith and had come to the U.S. from Germany in the early 1930's, at which time he had applied for naturalization. He was not, however, naturalized until 1940. In 1937, prior to his American naturalization, he revisited Germany on business. While in Germany he was taken forcibly into custody by persons described in his first suit as "Nazi officials" on various charges of violating certain German foreign exchange laws and imprisoned in Hamburg until July, 1939. These "Nazi officials" allegedly compelled him under duress to execute documents purporting to transfer the stock of his various companies to one Marcus Boeger, whom Bernstein described in his first suit as a "Nazi designee". Boeger took possession of the two companies' assets, including the vessels S.S. "Gandia", the S.S. "Penland", and the S.S. "Westernland". Boeger subsequently transferred the "Gandia" to Van Heyghen Freres, a Belgian scrap concern, and the "Penland" and "Westerland" to the Holland-America Line, a Dutch concern. Both purchasers allegedly had full knowledge of the duress to which the plaintiff had been subjected.

The first Bernstein case concerned his suit against Van Heyghen Freres, the purchaser of the "Gandia". Defendant paid approximately $90,000 for the vessel and shortly thereafter had it insured for about $350,000. The vessel passed on time charter to the British Minister of War Transport, was sunk during the war, and about $400,000 was paid over as insurance proceeds to another Belgian corporation acting as defendant's agent in England. This agent also did business in New York where the plaintiff in 1946

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served upon it in a state court proceeding an attachment of the insurance proceeds as a debt owing the defendant. In his complaint the plaintiff sought damages for conversion and detention of the vessel, or, alternately, recovery of the vessel's insurance proceeds and earnings while in the defendant's possession, as money had and received by the defendant for plaintiff's use.

The federal district court in New York, to which the case was removed on defendant's application, vacated the attachment and dismissed the complaint on the theory that the extortion was by "the German Government under the Nazi regime", that the defendant, accordingly, held as transferee of a foreign sovereign, and that, as the confiscation was within German territory, it was "not subject to review in our courts" and the court, therefore, would not review defendant's title. In other words, the court refused to question the legality of the German Government's confiscation on the basis of the "Act of State" doctrine.

The Court of Appeals for the Second Circuit, in a two to one opinion by Judge Learned Hand, affirmed the District Court decision, the majority holding that the plaintiff's allegation as to "Nazi officials" and description of Boeger as a "Nazi designee" conclusively connoted the alleged duress as official and the appropriation of plaintiff's assets by Boeger as a governmental "confiscation", and hence bound the court, in the absence of explicit action by the Executive removing this restraint, to follow the established judicial doctrine that a court will not pass upon the validity of the acts of officials

of another state. *Bernstein v. Van Heyghen Freres Societe Anonyme,* 163 F.2d 246 (2d Cir. 1947) (*Bernstein I*) The Court said:

> ". . . We have repeatedly declared for over a period of at least thirty years, that a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such. We have held that this was a necessary corollary of decisions of the Supreme Court, and if we have been mistaken, the Supreme Court must correct it.
>
> "Thus the case is cleared for the second question: whether since the cessation of hostilities with Germany our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the commonly accepted doctrine which we have just mentioned, does not apply. . . .
>
> "This the plaintiff acknowledges as generally true, but he says that it presupposes that the state of the forum has not acted to relieve its courts of restraint upon the exercise of their jurisdiction; and that our own government has already so acted. This is the remaining and the critical issue in the case; and we have to examine what those actions have been. . . .

> ". . . the only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; some positive evidence of such an intent being necessary. . . .

The Court, after an examination of relevant actions by the Executive, including the various declarations and Military Government laws and orders applicable to occupied Germany, held that the Executive Branch had not in fact taken such explicit action.

Judge Clark, dissenting, argued that the actions of the Executive Branch as regards this type of situation were in fact sufficient to lift the restraint of the "Act of State" doctrine as applied to this case. He said:

> ". . . if the policy of our Executive is one of non-recognition of Nazi oppression and of restitution to the Jews I think we are bound to observe it in our courts. And all the indications I have seen so far tend to support a finding that such is the policy of the United States. Indeed, without a clear showing to the contrary, I should think the classic excoriation of the Nazi leaders for these very acts, among others, made by the American prosecutor at Nuremberg, must be accepted by us as the authentic voice of our Executive." (at p. 255).

A petition to the Supreme Court for a writ of certiorari was denied (332 U.S. 772).

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D. *Recognition of Certain Debt Claims by the Office of Alien Property*

Following the decision in *Bernstein I,* the problem of Nazi confiscation came to the Department once more in the context of the work of the OAP, but now with respect to certain debt claims. It appeared that there were on file with the OAP a number of debt claims asserted under Section 34 of the Trading with the Enemy Act, as amended, seeking payment of deposit accounts out of the vested assets of the German banks of deposit. Those accounts had been turned over by the banks to the German Government pursuant to confiscatory decree directed against Jews. These decrees provided that the banks were discharged of their obligations to the depositors. The claimants before the OAP were the successors in interest of the former owners of the accounts.

Section 34(a) of the Trading with the Enemy Act provides that: "Any defense to the payment of such [debt] claims which would have been available to the debtor shall be available to the [Alien Property] Custodian." Under this provision, if the German decrees were to be considered to have effected a valid transfer of the accounts to the German Government and a discharge of the banks' obligations to their depositors, they constituted a defense available to the banks and hence payment of the claims should be opposed by the OAP.

Faced with this situation, and with *Bernstein I* in mind, Mr. Schlesinger, Chief of the Claims Branch of OAP, sent a letter of October 12, 1948 to Mr. Gross, the Legal Adviser, in which he stated that he would "appreciate any information you can give me as to the policy of the United States in this

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regard so that this Office can most effectively assist in the implementation thereof". (Tab D)

A letter of reply of December 9, 1948 (Tab E) (cleared by L – Mr. Tate) was sent to Mr. Schlesinger by Mr. Surrey, Assistant Legal Adviser for Economic Affairs. The letter stated that the U.S. Government had consistently opposed the recognition of German confiscatory and discriminatory laws, decrees and acts, citing references, and went on as follows:

> "Accordingly, the Department of State is of the view that it is against the policy of this Government to accord any validity to the German confiscatory and discriminatory laws, decrees and sets insofar as they may be concerned in the consideration of claims filed against vested German assets. The Department, therefore, recommends that these laws, decrees, and acts should not be used as a defense by your office to any claims filed against such assets.
>
> "In reaching this conclusion, the Department has considered the cases cited in your letter, and in particular the *Bernstein* case. In the *Bernstein* case, the court rested on what it stated to be the assumed executive policy, without, however, benefit of any indication from the executive branch as to what was in fact the executive policy. The problem raised by your inquiry is concerned with the establishment of an executive policy with

respect to defenses which may be presented against claims under section 34(a) of the Trading with the Enemy Act.

In the event that the Office of Alien Property adopts the policy proposed, this Department would have no objection to a public release announcing such policy, but would appreciate an opportunity of reviewing such release in advance of publication. Should the OAP desire to consider further the adoption of the proposed policy, the appropriate personnel of the Department will be available for discussion of the problem."

E. *Bernstein II case*

The next development in this matter was the handing down by the Court of Appeals for the Second Circuit of its decision in the first phase of *Bernstein II.*

In addition to his suit against Van Heyghen Freres, Bernstein had also brought suit for conversion and other relief against the N.V. Nederlandsche-Amerkaansche Stoomvart-Maatsachappij (the Holland-America Line), which had purchased the assets of his Red Star Line, including the S.S. "Penland" and S.S. "Westernland", from Boeger, the "Nazi assignee". The complaint in this suit included causes of action for the recovery of insurance moneys paid to Holland-America in connection with the loss of one of the vessels and for the recovery of the proceeds of the sale of the other.

After his failure in the Van Heyghen suit (*Bernstein I*), Bernstein amended his complaint in the Holland-America suit to omit his former allegations of duress by Nazi officials and attempted to set forth duress in very general terms and without revealing the source. The District Court, among other actions, dismissed this amended complaint (76 F. Supp. 335, 79 F. Supp. 38). The dismissal of the amended complaint, among other questions*, was considered by the U.S. Court of Appeals for the Second Circuit in *Bernstein v. N.V. Nederlandsche-Amerikaansche, etc.,* 173 F.2d 71 (2d Cir. 1949). In its opinion in that case, the court held (at pp. 75-76) that because of its decision in the *Van Heyghen* case and Bernstein's former flat allegations that the duress was caused by Nazi officials, any amendment must contain an allegation that the duress was not caused by the action of such officials and in addition should specify with reasonable detail the persons by whom, and the manner in which, the duress was exercised, which the amended complaint did not. However, the court held that under certain circumstances, Bernstein could file a further amended complaint alleging duress in accordance with the above requirements, and remanded the case to the District Court.

After losing the first phase of *Bernstein II*, Mr. Bennet, of Bennet, House & Couts, attorneys for Bernstein, came to the Department in person and asked if the Department had

* There were also questions concerning the applicability of the New York Statute of Limitations to the action, the right of Bernstein to intervene as a party-plaintiff in his capacity as temporary New York receiver of the Red Star Line, and a third party complaint by the defendant against the Chemical Bank & Trust Company as warrantor.

any views to express in this particular matter. This was, of course, at a time when we had already come quite a long way in connection with this problem. After internal discussion, it was decided to write a letter to Bernstein's attorneys, which would meet the problem raised by the court in *Bernstein I* by stating that:

> "The policy of the Executive, with respect to claims asserted in the U.S. for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of the Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

Such a letter was sent on April 13, 1949 (Tab A). Copies were sent to the attorneys for Holland-America Line and to New York Federal District Court Judge Ryan. The letter was also published as Press Release 296 of April 27, 1949 and in 20 Department of State Bulletin 592 (1949).

Following the issuance by the State Department of its Press Release 296 on April 27, 1949, releasing the text of the Bennet, House & Couts letter of April 13, 1949, Bernstein filed with the Second Circuit a petition to amend the mandate it had handed down in its prior decision at 173 F.2d 71 (*Bernstein II,* 1st phase).

In *Bernstein v. N.V. Nederlandsche-Amerikaansche, etc.,* 210 F.2d 375 (2d Cir. 1954) (*Bernstein II,* 2nd phase), the

Court granted this petition. After citing and quoting in part the State Department's letter, the court said:

> "In view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on the acts of officials in Germany during the period in question. See 173 F.2d at pages 75-76. This will permit the district court to accept the Release in question in evidence and conduct the trial of this case without regard to the restraint we previously placed upon it." (at p. 376)

It was reported in the New York Times sometime later that the *Bernstein* case was settled on terms considered favorable by the Bernstein lawyers. In any event, no further decisions on this matter were handed down.

Appendix 11 — Letter from David L. Bazelon, Director, Office of Alien Property, and Assistant Attorney General, Department of Justice, to Seymour J. Rubin, Esq., Mar. 3, 1949 (copy on file in court papers of Judge Charles E. Clark, Yale University Library, Manuscripts and Archives, Group No. 1344, Box 45, Folder 182)

OFFICE OF ALIEN PROPERTY
Department of Justice
Washington 25, D.C.

Mar 4, 1949

Seymour J. Rubin, Esq.
Attorney at Law
1822 Jefferson Place, N.W.
Washington 6, D.C.

Dear Mr. Rubin:

This is with reference to your letter of December 15, 1948, concerning the question whether this Office should utilize German discriminatory decrees as a defense to debt claims asserted under section 34 of the Trading With the Enemy Act, as amended. The Department of State has advised this Office that the Government of the United States has consistently opposed the recognition of German confiscatory and discriminatory laws, decrees and acts, and in this connection it referred to the Inter-Allied Declaration on Axis Acts of Dispossession of January 4, 1943; the Gold Declaration of February 22, 1944; Law No. 1 of the Allied Control Council; Military Government Law No. 1 (implementing certain provisions of J.C.S. 1067); and Military Government Law No. 59 dealing with Restitution of

Identifiable Property. Accordingly, the Department of State was of the view that it is against the policy of this Government to accord any validity to the German confiscatory and discriminatory laws, decrees and acts insofar as they may be concerned in the consideration of claims filed against vested German assets. The Office of Alien Property, therefore, will not assert as a defense to debt claims filed under Section 34, decrees, laws and regulations of the former government of Germany, enacted or promulgated during the period between January 30, 1933 and May 8, 1945, which discriminated against individuals because of membership in a political, racial or religious group.

I might add that the Department of State in reaching its conclusion gave consideration to the *Bernstein* case (163 F.2d 246 (C.A.2d, 1947)), and in this connection pointed out that there the court rested on what it stated to be the assumed executive policy, without, however, benefit of any indication from the executive branch as to what was in fact the executive policy.

Sincerely yours,

/signed/ David L. Bazelon
David L. Bazelon
Assistant Attorney General
Director, Office of Alien Property

Appendix 12 — Secretary of State Frank B. Kellogg letter and certification of excerpt of Geneva World Economic Conference Report July 7, 1927, in [same as immediately above, except] Folder 41-124(3)

DEPARTMENT OF STATE

Washington

In reply refer to
So. 311.5154 L 49/ –

July 7, 1927.

The Honorable

The Attorney General.

Sir:

I have the honor to refer to your letter of July 7, 1927, regarding the action which has been instituted in the District Court of the United States for the Southern District of New York against Deutches Kalisyndikat Gesellschaft et al, on the ground that the operations of the defendants are in violation of the Sherman Anti-Trust Act and the anti-trust provisions of the Wilson Tariff Act.

I am pleased to inform you that the records of the Department do not disclose that Jean Le Cornec, Pierre Gide, Réné Gide, or Walter B. Howe are members of the diplomatic or consular service of the French Government in the United States. The Société Commerciale des Potasses d'Alsace, to which you refer, does not of course have any diplomatic or consular status in this Country.

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I would state, however, that the Department, on April 12, 1927, received from the French Ambassador, a note bearing that date, with respect to the service of a subpoena on April 7, 1927, in the Southern District Court of New York on Mr. Jean Le Cornec, Director General of the Société Commerciale des Potasses d'Alsace, and others, and urging that this Department bring to the attention of the Department of Justice the representations of the French Ambassador set forth in his note. A copy of the Ambassador's note was sent to you with this Department's letter of April 12, 1927, which was acknowledged by you on April 20, 1927.

I had previously been informed by your Department that the proceedings, in connection with which the above mentioned note of the French Ambassador was addressed to me, were brought by your Department to enjoin alleged violations of the Sherman Act and the anti-trust provisions of the Wilson Tariff Act, in connection with the importation and distribution of potash in this Country, and that it had been urged in that suit that sovereign immunity should extend to the defendants on the ground that they are acting as representatives of the French Government in the commercial undertaking referred to.

With respect to your inquiry concerning the views of this Department regarding the matter, I have to inform you that it has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, and individuals doing business here, and should conform to the laws of this country governing such transactions.

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I have the honor to be, Sir,

Your obedient servant,

Frank B. Kellogg.

Appendix 12

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

Washington, D.C., July 7, 1927.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed papers are a true copy of the original letter, which is on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

s/, [illegible]
Assistant to the *Attorney General.*

Appendix 13 — The Dorotheum Catalogues

DOROTHEUM

SEIT 1707

Klassische Moderne und
Zeitgenössische Kunst
Mittwoch, 27. November 2002, Palais Dorotheum

Appendix 13

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No. 03-13

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IN THE

Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state, and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR BET TZEDEK LEGAL SERVICES AND THE AMERICAN JEWISH COMMITTEE AS *AMICI CURIAE* SUPPORTING RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Bet Tzedek Legal Services ("Bet Tzedek"), "The House of Justice", is a non-profit, pro bono legal services agency that provides free, high quality, compassionate legal representation to thousands of low-income residents. Bet Tzedek provides these services to clients of all racial, religious and ethnic backgrounds and regularly represents survivors of the Holocaust completely free of charge, in their efforts to secure reparations as compensation for the horrors endured during the World War II era. Presently, Bet Tzedek represents more than 800 such clients, each asserting claims under foreign-based programs or United States-based litigation. Bet Tzedek represents these clients through the efforts of its full-time staff and assistance of more than 400 volunteer attorneys.

The claims of many of Bet Tzedek's clients depend upon their ability to assert jurisdiction against foreign sovereign states under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602, *et seq.* The interests of Bet Tzedek's clients, therefore, are likely to be greatly influenced by this Court's determination of the applicability of the FSIA to Holocaust era atrocities.

The American Jewish Committee ("AJC") is a national, not-for-profit, human relations organization, founded in 1906 to protect the civil and religious rights of Jews the world

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1. Pursuant to SUP. CT. R. 37.6, *amici* Bet Tzedek and AJC warrant that this brief was authored entirely by counsel for *amici curiae* and no one other than *amici* made a monetary contribution to the preparation or submission of this brief. Pursuant to SUP. CT. R. 37.3(a), this brief is filed with the written consent of all parties, whose letters of consent have been lodged with the Court.

over, and to combat anti-Semitism and other forms of bigotry. It maintains 32 regional offices in major cities nationwide and has more than 125,000 members and supporters. With offices in Berlin, Geneva, and Warsaw, AJC is in frequent contact with European governments and European Jewish community leaders.

AJC has a long history of active involvement with restitution and indemnity claims on behalf of Jewish survivors of the Holocaust. Since before the end of World War II, AJC has played an integral role in advocating for rehabilitation and resettlement programs, restitution, and the return of Jewish assets to Holocaust survivors and their heirs. In furtherance of its goal to ensure that survivors live in dignity, security and peace, AJC, together with a few other organizations, engaged in a series of direct negotiations with the German and Austrian governments beginning in the late 1940s and 1950s. It was a founding member of the Conference on Jewish Material Claims Against Germany and of the Committee for Jewish Material Claims on Austria, which resulted in a 1955 agreement providing for some reparations to victims of Nazism in Austria.

In more recent years AJC has been an active participant in the various discussions and negotiating efforts to secure the restitution of former Jewish communal and private property. It was an official participant in the Washington Conference on Holocaust-Era Assets in 1998 and in the Vilnius Conference on Looted Jewish Cultural Assets in 2000. AJC representatives have offered testimony on the subject before the Senate Foreign Relations Committee, the House Banking Committee, and the Commission on Security and Cooperation in Europe, and before the Parliamentary Assembly of the Council of Europe in Strasbourg.

SUMMARY OF ARGUMENT

The primary submission made by Petitioners and their *amici curiae* rests on a startlingly inaccurate legal conclusion – that Austria would have successfully claimed immunity if this case had been adjudicated prior to the FSIA's enactment in 1976. In fact, under the relevant international law in force at the time that the operative events of this case arose (variously determined as between 1925 and 1948), Austria would *not* have been immune from a suit such as this for restitution of artworks that it claimed by virtue of succession, gift, bona vacantia, or escheat.[2] This conclusion is supported not only by the United States' practice and policy statements contemporaneous with the issuance of the Tate Letter in 1952, but also by Austria's own state practice as to foreign sovereign immunity in expropriation claims and by other background rules derived from customary international law and treaties binding on Austria and the United States.

Despite the narrow factual circumstances of this case, Petitioners and their *amici* seek an awesomely broad ruling from this Court rejecting any possible retroactive effect of the FSIA to events and causes of action arising prior to its enactment in 1976. There is simply no reasoned ground for the Court to make such a ruling here. Not only is such unnecessary given this Court's jurisprudence concerning the retroactive effect to be given to jurisdictional statutes such as the FSIA (an issue briefed fully by Respondent), but also no contrary result is dictated by international law nor by any compelling foreign policy interests of the United States.

2. At bottom, this case concerns a foreign state's claim of immunity to a suit for restitution of artworks Petitioners concede were either the subject of a deed of gift by Respondent's predecessors-in-interest or an exercise of escheat by the Austrian government. *See* Pet'r Br. at 5-8.

ARGUMENT

I. U.S. PRACTICE CONTEMPORANEOUS WITH THE 1952 TATE LETTER WOULD HAVE PERMITTED MRS. ALTMANN'S SUIT TO PROCEED.

Both Petitioners and their *amici curiae* have made much of the May 19, 1952 letter addressed by Acting State Department Legal Advisor, Jack B. Tate, to the Attorney General ostensibly announcing a "new" U.S. policy of restrictive foreign sovereign immunity. *See* Letter from Acting Legal Advisor Jack B. Tate to Acting Attorney General Philip B. Perlman (May 19, 1952) 26 Dept. State Bull. 984-85 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976), attached as "Appendix A" to Petitioners's Brief. A careful review of this communication reveals, however, that the established position of the United States – including the Executive Branch and the Courts – would have been to *deny* Austria's claim of immunity in a case such as this. The key language of the Tate Letter makes the following crucial distinction:

> A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with

> respect to private acts (*jure gestionis*). *There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions* with respect to real property (diplomatic and perhaps consular property excepted) or *with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary*.

425 U.S. at 711-12 (emphasis added); Pet'r Br. at App. 1a-2a (emphasis added). Thus, the Tate Letter confirms that whether the absolute or restrictive theory of sovereign immunity applies, Austria could not claim immunity with respect to restitution of the artworks taken here.

The Tate Letter further explains that Austria had, in fact, adopted the restrictive view of foreign sovereign immunity by the 1920s:

> The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory.

425 U.S. at 712; Pet'r Br. at App. 3a.

As the Tate Letter also made express, the restrictive theory of foreign sovereign immunity would grant immunity to a foreign State for its sovereign or public acts (*jure imperii*), but not for private acts (*jure gestionis*).

See 425 U.S. at 711-12; Pet'r Br. at App. 1a-2a. This distinction was first noted by Chief Justice Marshall writing in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), where he observed the following:

> [T]here is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; . . .

Id. at 145. And while Petitioners and their *amici curiae* attempt to portray the operative events of this case as somehow implicating Austria's public or sovereign acts, in actuality Austria's claim to the artworks in this case depends on a series of private transactions, really no different than those referred to by Chief Justice Marshall in *The Schooner Exchange*.

The 1952 Tate Letter thus contemplated situations in which a foreign sovereign would be sued for actions in respect to movable property in which the foreign sovereign claimed an interest via succession, gift, bona vacantia, or escheat. When this principle was codified in the 1976 FSIA, Congress actually located this principle in two sections of the statute – once in section 1605(a)(3), which is the subject of the current case, as well as in section 1605(a)(4), which provides that a

foreign State shall not be immune in cases "in which rights in property in the United States acquired by succession or gift . . . are in issue". 28 U.S.C. § 1605(a)(4).

When read together, it is clear that these two provisions are derived from the pre-existing customary international law and U.S. practice which refused to grant immunity to foreign States in which at issue were fundamentally private law relationships such as gifts, donations, and succession, or even exercises of quasi-governmental authority such as escheat or bona vacantia. As Congress noted in adopting this section of the FSIA, following from the 1952 Tate Letter,

> There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. . . . The reason is that, in claiming rights in a decedent's estate if obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

Foreign Sovereign Immunities Act of 1976, H.R. REP. No. 94-1487, at 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6619. In short, based on the 1952 Tate Letter – which Petitioners and their *amici curiae* agree is the authoritative statement of U.S. foreign sovereign immunity policy contemporaneous with the crucial operating events of this case – Austria would not have been immune in United States courts from Mrs. Altmann's suit for replevin of the disputed artworks.

II. LONG BEFORE 1952, AUSTRIA HAD ACCEPTED THE RESTRICTIVE THEORY OF FOREIGN SOVEREIGN IMMUNITY, THUS ESTOPPING THE POSITION IT NOW TAKES HERE.

As already noted, the restrictive theory of foreign sovereign immunity limits a foreign sovereign's immunity against suit. In Austria, this theory was first accepted by the Austrian Supreme Court (the Oberster Gerichtshof) in its Judgment of Dec. 17, 1907, *reprinted in* 21 Röll, EISENBAHNRECHTLICHE ENTSCHEIDUNGEN No. 122 (1907), and cited in *Dralle v. Republic of Czechoslovakia*, 17 INT'L L. REP. 155, 156 (Sup. Ct. of Austria 1950). Austria's acceptance of the restrictive theory of foreign sovereign immunity was again upheld in 1920, when the Austrian Supreme Court permitted the Ottoman State to be sued in an Austrian court over a contract dispute arising from the construction of diplomatic premises in Vienna. See Judgment of Jan. 5, 1920, II ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN ["SZ"] No. I, cited and extracted in *Dralle*, 17 INT'L L. REP. at 156.

Most telling of all is the case of *Dralle v. Republic of Czechoslovakia*, 17 INT'L L. REP. 155 (1950), in which the Austrian Supreme Court held that Czechoslovakia had no immunity in an Austrian court in a dispute concerning Czechoslovakia's expropriation, in 1945, of intellectual property owned by an Austrian and German concern. Not only is the nature of the case instructive, but the time frame is decisive for any determination of what Austria's reasonable expectations as to foreign sovereign immunity would have been in the years in question in this case, from 1925 to 1948. In *Dralle*, the Austrian Supreme Court determined that the doctrine of absolute immunity was no longer applicable and

had in fact been abandoned by Austria at the beginning of the twentieth century. *See id.* at 162 (citing Judgment of Dec. 17, 1907, 21 Röll, *EISENBAHNRECHTLICHE ENTSCHEIDUNGEN*, No. 122 (1907), as well as the Judgment of Jan. 5, 1920, SZ II/I). The Austrian Supreme Court concluded in *Dralle* that foreign sovereigns were simply not immune in Austria's tribunals for suits implicating the commercial or proprietary interests of a foreign sovereign, even where that foreign sovereign's public acts of expropriation or nationalization were being challenged. *See Dralle*, 17 INT'L L. REP. at 163. Due to the determination of its own Supreme Court that international law no longer supported absolute immunity, Austria was clearly no longer expecting to receive immunity from suits involving expropriations. So long before the events giving rise to this case occurred, Austria had effectively waived its own sovereign immunity from suits raising causes of action under a restrictive theory of foreign sovereign immunity.

While studiously avoiding the point that Austria had, by 1950, fully embraced the restrictive theory of foreign sovereign immunity, the *amicus* brief of the United States nonetheless contends that Austria remains protected from suit in this case. This submission is meritless. The United States appears to argue that the restrictive theory of foreign sovereign immunity inherently excluded public acts, thus providing continued protection from suit when public acts are involved. A protected public act, the United States argues, would have included expropriation of private property. Thus, according to United States interpretation of the restrictive theory of foreign sovereign immunity, nationalizations/ expropriations by the United State government would not have given rise to a waiver of sovereign immunity. The United States thus concludes that Austria also would have expected

to remain immune form suits concerning expropriation of private property. This conclusion is based on the assumption that the Austrian interpretation of the restrictive theory and Austrian expectations of receiving the protection of foreign sovereign immunity relating to expropriations coincided with American interpretations or expectations.

The above assumption is flawed for two reasons. First, Austria did not enter into treaties with other foreign sovereigns providing for the return of expropriated property, but provided means to reclaim expropriated property in its own courts. Second, Austrian jurisprudence clearly indicates that Austria was inclined to abandon the doctrine of absolute immunity for other sovereigns in its own courts in cases involving expropriation.

First: Austria, unlike many other countries, did not enter into treaties after the Second World War with foreign powers to set a procedure for the return of expropriated property to the original owners. Countries like the former Yugoslavia, Bulgaria and others[3] entered into treaties with the United States to settle claims for expropriated property. These treaties provided means created through diplomatic channels to create a possibility for resolution of individual claims. However, neither the United States nor Austria has cited a similar treaty establishing international claims settlement for individuals.

Although Austria never entered into treaties effectuating the potential of resolution of individual claims, Austria insists

3. These and other countries are cited by the United States *amicus* brief for the proposition that diplomatic means were used, but the brief fails to cite to even one treaty in which Austria entered to the same effect. *See* U.S. Br. at 14, n.8.

that diplomatic means are the only appropriate solution. Austria relies on *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003), for the proposition that expropriations were the subject of diplomacy rather than litigation. Even if Austria could have its cake and eat it too – insisting diplomatic means are the sole solution but never creating an effective claims settlement mechanism – its reliance on *Garamendi* is still misplaced. Unlike in *Garamendi*, Austria is very adamant about having been a liberated Nation, not a defeated power. *Amici* will not question that assertion, believing that such a characterization is properly vested in the determination of the political branches of the government. But while Austria correctly asserts that reparations were an important goal after World War II, Austria, as liberated nation, was not obliged to pay reparations, creating a void for claimants such as Mrs. Altmann.

The fact that other countries did enter into diplomatic solutions with each other gives further evidence that Austria did not and could not possibly expect to reap the benefits of Nazi-era expropriations. By its own admission, Austrian courts have been available for claims by aggrieved individuals arising from acts of the Austrian government and its instrumentality. The only question for determination by this Court is whether Austria would have had any expectation of immunity in a foreign tribunal based on the same acts.

Second: Austria did not expect to be immune from suits brought in foreign tribunals in cases involving expropriations, because Austrian jurisprudence plainly demonstrates that Austria considered suits against sovereign nations concerning the return of formerly expropriated property admissible in its own courts. Unlike American jurisprudence, Austrian decisional law clearly favored admissibility of suits in

expropriation cases. And while Petitioners and their *amici* conveniently overlook the importance of the 1950 *Dralle* decision and its significant precursors, they are, instead, appearing to argue that municipal law should not determine the outcome of an issue of foreign sovereign immunity under international law. While that may be true in certain cases, in this case, municipal law reflects Austria's interpretations of international law and controls its expectations of immunity in courts outside of Austria.

Japan, in its *amicus* brief argues that Austria's adoption of the restrictive theory would not necessarily result in a lack of expectation of immunity by Austria. *See* Japan Br. at 19. Without conceding the point whether expropriations are included in the restrictive theory, it is manifest that the Austrian Supreme Court's 1950 decision in *Dralle* stripped foreign sovereigns of their immunity in expropriation cases brought in Austrian tribunals, and specifically determined that the theory behind the exercise of jurisdiction in an expropriation case does not rule the outcome of the case: "[W]e are, in any event, entitled to say that such submission of sovereign States in matters of private law is regarded as being admissible in international law." *Dralle*, 17 INT'L L. REP. at 162.

The United States also appears to assert that Austria's treatment of claims by its own courts against other foreign States would not preclude Austria from asserting foreign sovereign immunity in jurisdictions that still adhered to the absolute doctrine. But in asserting sovereign immunity in a foreign court, Austria's expectations for success would have been mixed at best. This is especially so since Austria had earlier been on notice that it would be subject to suit in foreign tribunals based on commercial claims including expropriation

theories. *See* Judgment of Mar. 13, 1918, 44 BUNDESGERICHTS ENTSCHEIDUNGEN I 54 (Swiss Fed. Trib. 1918). In that case, the Swiss Federal Tribunal (the highest court in that jurisdiction) surveyed international law and determined that it was no longer appropriate for Austria to claim foreign sovereign immunity.

III. CONSISTENT WITH ITS DUTIES UNDER THE 1907 HAGUE CONVENTION (IV), AUSTRIA HAS COUNTENANCED SUITS FOR RECOVERY OF LOOTED ARTWORKS.

The court of appeals below concluded that Austria's adherence to the 1907 Hague Convention (IV) on the Laws and Customs of War on Land ["Hague Convention (IV)"], Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631, 1907 U.S.T. LEXIS 29 (entered into force Jan. 26, 1910), signified that Austria could not "legitimately expect to receive immunity from the executive branch of the United States for its complicity in and perpetuation of the discriminatory expropriation of the Klimt paintings." J.A. at 50a. While Petitioners attempt to dismiss this holding as "simply wrong," Pet'r Br. at 28, the relevant provisions of the Hague Convention (IV), when read alongside the Austrian jurisprudence concerning the denial of foreign sovereign immunity, reveal that Austria had accepted the obligation not to regard the looting of artworks, or, indeed any seizure of art, as a "sovereign" act that would immunize a State from court proceedings in other countries.

Article 56 of the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV), provides:

> The property of municipalities, that of institutions dedicated to religion, charity and educations, the

> arts and sciences, even when State property, shall be treated as private property. [¶] All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

Hague Convention, Art. 56, 36 Stat. at 2309, 1907 U.S.T. LEXIS 29, at *40. The first salient point about this provision is that it converts the object of what would otherwise be a sovereign act of expropriation, nationalization, looting or booty into "private property." An object of art which has been claimed by a sovereign under these circumstances would be endowed with a private character, thus defeating an assertion by the expropriating State that its conduct was a sovereign or proprietary act that would be immune from suit under principles of foreign sovereign immunity.[4] Under the Austrian Supreme Court's 1950 ruling in *Dralle v. Czechoslovakia*, a government taking of private property would be an *acta gestionis* that would not be accorded sovereign immunity. *See* 17 INT'L L. REP. at 163.

The other crucial point of Hague Convention (IV)'s Regulation Art. 56 is its requirement that seizures of artworks

4. Petitioners' suggestion that Hague Convention (IV) Regulation Art. 56 is inapplicable because duties run only to occupying powers, Pet'r Br. at 28, is not borne out by the text of the instrument. The Convention required that all "contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Law and Customs of War on Land, annexed to the present Convention." Hague Convention, Art. 1, 36 Stat. at 2290, 1907 U.S.T. LEXIS 29, at *17. Moreover, even if true, Germany was a contracting Power to Hague Convention (IV).

"should be made the subject of legal proceedings." Hague Convention, Art. 56, 36 Stat. at 2309, 1907 U.S.T. LEXIS 29, at *40. This language is unique in the treaty, and plainly conveys an obligation by a signatory State to permit judicial proceedings to determine the proper ownership of artworks that may have been the subject of confiscation (or other changes in ownership) during a period of belligerent occupation. Additionally, article 3 of the main body of the Hague Convention (IV) provides that a party "which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation." Hague Convention, Art. 1, 36 Stat. at 2290, 1907 U.S.T. LEXIS 29, at *17-18. These two provisions taken together create a legal obligation on the part of States to provide a legal mechanism to ensure the proper restitution of artworks which were the subject of confiscations or other related measures during wartime.

The United States has accepted this obligation, as well, not only as a party to Hague Convention (IV), but also the Roerich Pact, the Treaty on the Protection of Artistic and Scientific Institutions and Monuments, Apr. 15, 1935, 49 Stat. 3267, T.S. No. 889, which contains parallel provisions. Moreover, the United States Congress, in the 1998 Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15, found that "[e]stablished pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art." *Id.* at § 201. Thus:

> It was the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate

> the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Id. at § 202.

Petitioners's assertion that Hague Convention (IV)'s obligations do not constitute an express or implied waiver of immunity, Pet'r Br. at 29, is quite beside the point. The issue is not the one this Court considered in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), whether a particular treaty constituted a waiver of foreign sovereign immunity within the scope of 28 U.S.C. § 1605(a)(1). *See* 488 U.S. at 442 (considering the FSIA exception for situations "in which the foreign state has waived its immunity either explicitly or by implication"). Rather, the point is that Austria was on sufficient notice, in the early 1950s, that its conduct could give rise to an action brought in a foreign tribunal to which it could not properly claim sovereign immunity. Given that Hague Convention (IV) Regulation 56 constitutes a clear duty to permit restitutionary or replevin actions for confiscated artworks to proceed, and that Austria had (in the *Dralle* decision in 1950) confirmed that expropriation cases could be brought against foreign sovereigns in its own courts, Austria was certainly aware that it would be subjected to suits concerning restitution of artworks that it claimed by virtue of events arising from the occupation of its territory.

CONCLUSION

The judgment of the court of appeals should be AFFIRMED.

Respectfully submitted,

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In The
Supreme Court of the United States

THE REPUBLIC OF AUSTRIA
and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF AMICUS CURIAE OF MICHAEL BERENBAUM, JUDY CHICAGO AND DONALD WOODMAN, HEDY EPSTEIN, HECTOR FELICIANO, PETER HARCLERODE, DEBORAH E. LIPSTADT, FRANKLIN H. LITTELL, MARCIA SACHS LITTELL, HUBERT G. LOCKE, BRUCE F. PAULEY, BRENDAN PITTAWAY, CAROL RITTNER, AND JOHN K. ROTH, IN SUPPORT OF THE RESPONDENT

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are scholars of the history of the Shoah, or of the history of modern Germany and Austria, or of art history in the period relevant to this case.[1] Particular statements about each amicus are included in Appendix A. Amici are intimately familiar with the events that form the broad background to issues presented in this case and other cases involving Nazi-looted art that may be affected by the Court's ruling in this case.

Amici have a keen interest in rigorous honesty in assessing the meaning of the Shoah and its relevance to the contemporary world. This interest impels the amici to challenge any claim of absolute sovereign immunity by any nation that would seek to profit improperly from the dispossession of victims of racial or religious discrimination by nation states in violation of international law. Hence they have a strong interest in preventing any nation, including our own, from benefiting from ongoing possession of Nazi-looted art.

All of the amici are engaged in one way or another in education about genocide, and in particular about the

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[1] Pursuant to Rule 37.6 of the Rules of this Court, amici state that no counsel for a party has authored this brief in whole or in part and that no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties. The consent letters have been lodged with the Clerk of the Court.

Holocaust. They have a strong interest in preserving the memory of the Shoah. Two phrases encapsulate this interest: "Never Forget" and "Never Again." The trivialization of the Shoah or, worse yet, its elision or outright denial, leads to further atrocities. When Hitler undertook the invasion of Poland in 1939, he reminded his generals that "nobody remembers the Armenians," who had been subjected to mass deportation and murder in the second decade of the last century. *See, e.g.*, Peter Balakian, *The Burning Tigris: The Armenian Genocide and America's Response* (2003). We dare not fail to remember the Shoah.

SUMMARY OF ARGUMENT

When facts are as deplorable as those described in careful findings by the District Court and by the Court of Appeals – plunder of the property of Jews by the Nazis in the late 1930s, extortion practiced by Austrian officials shortly after the war to induce the surrender of valuable property rights by traumatized and penniless survivors of the Shoah, and ongoing deception of the victims perpetrated by Austria that came to light only when the Austrian Gallery's archives were opened in 1998 – it is unsurprising that counsel would argue a legal point that would impede our courts from reaching the merits of the plaintiff's claim. The legal theory advanced by the petitioners is that Austria and its instrumentality, the Austrian Gallery, enjoy absolute sovereign immunity, even in a case seeking restitution of Nazi-looted art to its rightful owners.

In this brief amici provide the Court with crucial historical background information with which to assess petitioners' misplaced reliance upon absolute sovereign immunity. Section I situates the alleged theft of these paintings within the larger context of the crime of genocide perpetrated by German and Austrian Nazis. The very language of crime had to be reinvented to describe the enormity of state-sanctioned moral depravity in the

twentieth century. The term "genocide" was invented in 1944 to describe what Winston Churchill referred to as "a crime without a name." A year later the Treaty of London addressed two distinct crimes – war crimes and crimes against humanity – that guided the International Military Tribunal at Nuremberg, in which Justice Jackson served as Chief Prosecutor for the United States. Justice Jackson and his staff amassed overwhelming documentary evidence proving that the dispossession of Jews was linked to the larger pattern of massive criminality comprehended under the terms, "genocide," "war crime," and "crime against humanity." This pattern of gross violation of the dignity, personhood and property of Austrian Jews serves as the matrix of understanding of the claim of immunity presented in this case.

In Section II amici urge that federal courts most emphatically have plenary jurisdiction over the crime of genocide and its fruits, and that no nation enjoys sovereign immunity from this crime, any more than it would from acts of piracy, terrorism, or engaging in slavery. The taking of property on the basis of religion and race renders inapplicable any reliance upon the Act of State doctrine. The discussion about whether Austria was a "hostile nation" during World War II is a red herring. The real issue is whether petitioners may now invoke sovereign immunity about retention of looted art that is the fruit of a vast conspiracy to murder.

In Section III amici present a brief chronology of critical developments in international law and in the history of Europe, and more particularly in the history of Austria, that may be useful for the Court as it assesses the jurisdictional defense improperly relied upon by the petitioners.

In Section IV amici offer important jurisprudential considerations that support affirming the decision below. First, the Court should avoid exalting legal formalism in a manner that would enable any country to profit from avoiding its responsibility of returning Nazi-looted art to

those from whom it was stolen or to their sole surviving heirs. To do so would send a curiously weak message to Austria and other nations about the correlative duties – now formally acknowledged by Austria, 43 other nations, and by the art community throughout the world – to search carefully for evidence of Nazi-looted art and to restore such art promptly to its rightful owners. Second, far from interfering with the foreign policy of the United States, allowing federal courts to serve as fora for redress of serious crimes arising from the Holocaust era enables such claims to be resolved judiciously and in conformity with the rule of law and the fundamental freedoms championed by this country when it undertook its titanic struggle in World War II against Fascism. Third, the Court should enable the world to continue to remember the darkest moment of the twentieth century, the Shoah, so as to avoid its repetition to anyone, anywhere.

ARGUMENT

I. Jurisdiction over Restitution of Nazi-Looted Art Should Be Evaluated within the Broad Context of the Nazi Atrocities and of the Extortion and Deception Practiced by the Austrian Government after World War II

A. Historical Misstatements and Lacunae in the Statement of the Case

Maria V. Altmann, a Jew of Vienna, survived the Shoah by leaving everything behind in 1938, the year of the *Anschluss* or annexation of Austria into "Greater Germany" and of the Kristallnacht or night of broken glass when the Nazis raided and burned synagogues all over Germany and Austria, removing any lingering doubt in the mind of most Jews that there was no safety for them in the Third Reich. After her husband was released from Dachau, Maria Altmann fled with him to England. Four years later they emigrated to this country, and in 1945 she became an American citizen. On August 22, 2000, she

commenced this civil action seeking restitution or replevin of six paintings by Gustav Klimt held by the Austrian Gallery.

Petitioners, the Republic of Austria and its instrumentality, the Austrian Gallery in Vienna, paint a rosy picture of the state of the record in this case, confidently asserting both in the Petition and their opening brief that the paintings are "owned by the Republic." Pet. 3, Br. Pet. 5. This misleading statement ignores the very heart of this litigation – that these six paintings are in fact "owned by Maria V. Altmann, but in the wrongful possession of the Republic of Austria and the Austrian Gallery." Complaint, J. App. 152a.

Austria asserts several reasons for the legal validity of its ongoing possession of the disputed paintings. Upon close scrutiny, none of these claims establishes a legally compelling reason against restitution of the art to Altmann.

Petitioners argue that the Court of Appeals "seriously misread the historical record." Br. Pet. 31-38. As trained historians, amici believe that the Court of Appeals got the core historical reality just right. In attacking the judges who rejected their claim of absolute immunity for Holocaust-era plunder, petitioners open the door to evaluation of their own historical reliability. Among the errors that crept into their statement of the case is the false claim that a provision in the 1923 will of Adele Bloch-Bauer had the effect of transferring the Klimt paintings to the Austrian Gallery. Br. Pet. 6. According to petitioners, Adele "provided in her will that six paintings by Gustav Klimt, which had hung in the Bloch-Bauer palais in Vienna until the time of her death [in 1925], should be given to the Austrian Gallery upon her husband's death." *Id.* Not quite. The relevant portion of the will reads: "I kindly ask my husband to bequeath my two portraits and four landscapes by Gustav Klimt after his death to the Austrian National Gallery in Vienna." An ancient maxim of Roman law states: "*Nemo dat quod non habet*. No one gives something

they don't have." This principle functions in the law of Austria and the United States. *See* Opp. 2 n. 1.

Petitioners make much of the delivery of a Klimt painting to the Austrian Gallery by Adele's widower, Ferdinand Bloch-Bauer, in 1936. They suggest that this fact demonstrates Austria's good faith in holding on to all of the disputed paintings. After all, they claim, didn't Ferdinand do precisely what Adele had hoped he would do in her 1923 will? But this is a red herring. The painting that Ferdinand brought to the Austrian Gallery is not involved in this litigation at all.

The critical piece of information on which the Court should focus is the date of the expropriation of the six disputed paintings, which occurred nearly a year *after* the Anschluss, March 12-13, 1938, when Nazi hegemony in Austria became complete. The disputed paintings were not given by Ferdinand to the Austrian Gallery in 1936. In 1938 Ferdinand fled Vienna for his life. He went first to Czechoslovakia. After England and France agreed at the Munich Conference that Hitler could occupy the Sudetenland, Ferdinand fled again, this time to Switzerland, leaving behind all his possessions. His castle in Prague became the headquarters of Reinhardt Heydrich, the key person in planning and executing the anti-Jewish policies of the Third Reich. In 1939 the Nazis raided Ferdinand's Vienna residence, and looted all of its contents, including the paintings at issue in this case. Dr. Erich Führer – the Nazi bureaucrat in charge of looted art, who passed paintings to Hitler and Göring in their private capacity as collectors of fine art, and who kept several treasures for himself – gave two of the disputed Klimts to the Austrian Gallery in 1941, and a third to the gallery in 1943.

Ferdinand Bloch-Bauer lived in penury in England. *See* Appendix B: letter to Oskar Kokoschka, April 2, 1941. He died in November 1945, leaving a will that revoked all prior wills and that bequeathed all his possessions to Maria Altmann, her brother, and her sister. J. App. 40a. Neither the 1923 will of Adele nor the 1945 will of Ferdinand may be

construed with any degree of plausibility as effectuating a transfer of property to Austria. As Mrs. Altmann notes, "What love could my uncle have for Austria after they robbed him of everything?. . . . This art was dragged out of the house by people who murdered their friends. Would Adele want the things she treasured left [in Austria] after that?" Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* 242 (2003).

Petitioners fail to mention the famous London Declaration of January 5, 1943, in which the Allies and all European governments-in-exile issued a formal warning of their intent "to defeat the methods of dispossession practiced by the Governments with which they are at war" and reserved all their rights "to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the [Nazi] occupation or control. . . ." Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control of 1943, 8 Dept. St. Bull. 1943 at 21. *See* Hector Feliciano, *Lost Museum* 224 (1997); and Lawrence Kaye, "Laws in Force at the Dawn of World War II: International Conventions and National Laws," in Elizabeth Simpson, ed., *The Spoils of War: World War II and its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property* 100-105 (1997); the text of the London Declaration is printed as an Appendix, *id.* at 287.

More curiously, petitioners failed to comment on the Nullity Act of 15 May 1946, in which Austria made all wartime "Aryanizations" of property null and void. J. App. 40a. For a discussion of Aryanization of property, *see* Avraham Barkai, "risierung," in Israel Gutman, ed., 1 *Encyclopedia of the Holocaust* 84-87 (1990).

Instead of acknowledging these facts, petitioners rely on a highly dubious 1948 transaction in which the Altmann family lawyer, Gustav Rinesch, agreed with Austrian officials to extinguish his clients' claims to the paintings in exchange for an export permit allowing the

family to have other items of property sent to them. As the District Court found, "It was the policy after the war to use the export license law to force Jews [living abroad] who sought export of artworks to trade artworks for export permits on other works." J. App. 76a. Extortionate deals such as this were unambiguously denounced as "indefensible" by Dr. Ernst Bacher, Chairman of Austria's Provenance Commission. *Washington Conference on Holocaust-Era Assets* 455 (1998), http://fcit.usf.edu/holocaust/resource/assets/heac4.pdf

Fifty years later a conflict erupted over the ownership of two paintings by the modernist Egon Schiele that had been stolen by the Nazis from Austrian Jews, and that were on loan from Austria to the Museum of Modern Art in New York. *See* Bazyler, *Holocaust Justice* 226-38. Like this case, the Schiele litigation is a Holocaust restitution case. Unlike this case, it was brought by the United States as a criminal matter seeking the civil remedy of forfeiture. *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000).

In the midst of this controversy, the Austrian government opened the Austrian Gallery's archives to researchers to confirm independently that Austria did not possess any other Nazi-looted art. Instead of confirming this point, an Austrian journalist, Hubertus Czernin, found important documents about the Klimt paintings that led to the filing of this case. First, the Austrian Gallery had always publicly claimed that it had acquired its showpiece *Adele Bloch-Bauer I,* as a donation from Ferdinand Bloch-Bauer in 1936. According to the archival records at the gallery, however, the "donation" was made in 1941, when Dr. Führer – the Nazi art liquidator – transferred this painting to the gallery, accompanied by a letter signed "Heil Hitler." Second, Czernin discovered postwar correspondence between Dr. Karl Garzarolli, then director of the Austrian Gallery, and his predecessor expressing concern that Adele's will did not legally transfer the paintings to the Austrian Gallery and that the gallery never obtained

"even during the Nazi era an incontestable declaration of gift in favor of the [Austrian] state from Ferdinand Bloch-Bauer." Bazyler, *Holocaust Justice* 243. Third, Czernin discovered and later provided to Maria Altmann details of the extortionate deal between Austria and the Altmann's lawyer in 1948, under which the three Klimt paintings that came to the Austrian Gallery during the war were allowed to stay there and the others could remain in Austria and later came to the Austrian Gallery. The discovery of a smoking gun at a crime scene is rare. The discovery of three smoking guns fired at different times is rarer still. The District Court made careful findings about all these facts. J. App. 77a-81a. So did Dr. Rudolf Welser, Chairman of the Institute of Civil Law, University of Vienna. *See* http://www.adele.at/Rechtsgutachen/rechtsgutachen.html (109 page legal opinion on whether Austria acquired a claim to or ownership of the paintings at issue in this case, and whether, pursuant to the Austrian law of restitution of artworks, 4 December 1998, authority exists to restitute these paintings without remuneration to the heirs of Ferdinand Bloch-Bauer).

Petitioners' claim that "Austria's ownership of the paintings derives from events that occurred before and after World War II, independent of Nazi atrocities," Br. Pet. 5, thus hangs on a very slender reed. In fact, it collapses under the well-settled rule that the facts alleged in a well-pleaded complaint, J. App. 151a-208a, must at this stage of the litigation be accepted as true. *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980).

B. The Lexicon of Crime Was Reinvented in the Mid-Twentieth Century to Describe the Enormity of State-Sanctioned Moral Depravity

The term "grand larceny" used to signify the felonious taking of another's property of such value as to be punishable as major theft. The term "rape" used to define the most depraved violence of a man imposing himself by force upon a woman. The term "homicide" used to bear the full

weight of the most grievous offense in penal codes, the unjustified taking of a human life. The term "perjury" used to connote the most reprehensible distortion of language to deceive a fact-finder: deliberate lying intended to mislead the fact-finder.

None of these terms is adequate to describe the enormity of state-sanctioned moral depravity in the twentieth century. Property theft included land grabbing of massive proportions, and such widespread dispossession and homelessness as to become a major cause of death by the millions. From the Turkish abuse of Armenian women to the Serbian gang rape of Muslims in Bosnia, rape became the prelude to slaughter.

It has long been known that truth is the first casualty of war, but British lies about German soldiers eating Belgian babies during World War I pale into harmless distortions when compared to the propaganda and cover-up practiced by the Nazis in World War II. The perpetrators of plunder and murder routinely employed a rhetoric of bureaucratic double-speak that masked the foul reality of their deeds. Justice Jackson described "the Nazi habit of economizing in the use of truth" in his famous closing argument at the International Military Tribunal at Nuremberg: "Lying has always been a highly approved Nazi technique. . . . Nor is the lie direct the only means of falsehood. They all speak with a Nazi doubletalk with which to deceive the unwary. In the Nazi dictionary of sardonic euphemisms 'final solution' of the Jewish problem was a phrase which means extermination; 'special treatment' of prisoners of war meant killing; 'protective custody' meant concentration camps. . . . The record is full of other examples of dissimulations and evasions." Cited in Robert E. Conot, *Justice at Nuremberg* 472 (1983).

One of the most painful duties of historians of war is to undertake careful post mortem analysis. This duty is especially necessary in the case of World War II, the most devastating of all wars, in which over 50 million lives were lost, overwhelmingly civilians, 6 million of whom were

Jews. It is critical to the understanding of the enormity of this evil that massive thefts, mass murder, and lies and denials were closely inter-related. They were all cut from the same bolt of cloth. The one led to the other. The Nazi cover-ups and doubletalk reinforced their crimes even to the point of making these foul deeds seem to be the "perfect crime" that would in the perpetrators' self-deception go unpunished.

Sir Winston Churchill was familiar with loss of life in the Boer War in which he served, and at the disastrous World War I battle of Gallipoli in which he had the lead role as planner. As First Lord of the Admiralty, Churchill understood that war entails loss of life. But the mass murder he encountered in World War II on an unprecedented scale led this seasoned military commander and master of rhetoric almost speechless. He called the devastating killing of civilians in Poland and other parts of the eastern front of World War II "a crime without a name." Martin Gilbert, *The Holocaust: A History of the Jews of Europe in the Second World War* 186 (1985); *see also id.* at 485 ("systematic cruelties . . . amongst the most terrible events of history . . . vile crimes").

The crimes of the Nazi era required the invention of a new lexicon of crime. In 1944, Raphael Lemkin, a Jewish refugee from Poland teaching at Yale Law School, coined the term "genocide" because, he said, "New Conceptions require new terms." Lemkin, *Axis Rule in Occupied Europe* 79 (1944). He defined genocide as "the destruction of a nation or an ethnic group . . . a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves." Lemkin identified the objectives of such a plan as the "disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups." Lemkin noted: "Genocide is directed against the national group as an

entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group." *Id.* Thus the sole "crime" committed by the Jews of Austria was that they were Jewish. This "crime" triggered the looting of their property, the forced deportation to outside countries or to slave labor camps such as Mauthausen, and finally to the death camps in Poland.

Lemkin's neologism was rapidly accepted. In 1945, Justice Jackson and his colleagues in the prosecution at the International Military Tribunal at Nuremberg included a charge of genocide in the indictments of Hermann Göring, Rudolf Hess and others. The judges at this tribunal, however, ignored this count of the indictments, and proceeded with the counts that conformed to the precise language of the Treaty of London, in which the Nazi atrocities are described as "crimes against humanity."

After the Nuremberg trials, the United Nations General Assembly declared genocide an international crime and ordered the drafting of a treaty aimed at its prevention and punishment. The final text of the Genocide Convention was adopted at the 1948 General Assembly. Fifty years later, in 1998, it has been ratified by two-thirds of the member states, including the United States and Austria. Concerned with both prevention and punishment, the Genocide Convention provides a detailed definition of the crime of genocide: "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

For these reasons, we dare not trivialize Nazi plunder or leave its victims with abstract rights and no effective

remedies, for these thefts were an integral part of the plan to deport Jews, first out of Austria and then to death camps in Poland. Rabbi Emil Fackenheim once wrote that it is "forbidden to hand Hitler posthumous moral victories" he does not deserve. Fackenheim, "On Jewish Values," *Judaism* (March 1967). If so, then we must do what we can to repair the damaged fabric of humanity by addressing each dimension of the Nazi atrocities. We must still grieve the unspeakable loss of life and call it mass murder. We must redress the thefts whenever, as here, it is feasible to do so.

C. The Looting of the Altmann's Property Must Be Evaluated within the Specific Context of Austrian Antisemitism and the Significant Participation of Austrians in the Mass Murder of Jews during the Nazi Era

Although the Nazi atrocities extended to non-Jews as well as Jews, *see, e.g.,* Michael Berenbaum, *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis* (1990), the particular details of this case – plundering the property of a prominent Jewish family of Vienna – require focus on Austrian complicity in the massive injuries sustained by the Jews of Austria before, during, and after World War II.

One of the leading scholars of this period of Austrian history describes the events following the Anschluss as "a major outburst of plundering and brutality perpetrated against the Jews. Only rarely were these acts committed by German Nazis, and still less often by German soldiers; rather it was the Austrian Nazis and even non-Nazis who now released the hatred against the Jews that they had repressed, especially since the outlawing of the Nazi Party in 1933." Bruce F. Pauley, "Austria," in David S. Wyman, ed., *The World Reacts to the Holocaust* (1996) (describing invasion of thousands of Jewish homes, pulling people out of their beds and stealing their money and jewelry, ordering Jewish women to dress in their best clothes and scrub

pro-independence slogans off sidewalks with their bare hands or with toothbrushes; forcing Jewish children to write the insulting word *Jud* on the windows of their fathers' shops, pulling Orthodox Jews around by their beards; compelling Jews to lie down at the Praterstern and eat grass).

One of the most infamous of the Austrian Nazis, Adolf Eichmann, operated the Central Office for Jewish Emigration in Vienna out of the Rothschild palace, which the Nazis had confiscated. "By systematic bureaucratic methods the Jews emigrating from the country were automatically divested of all their assets. Most of the financing of the emigration was funded by the levy that every emigrant had to pay, in proportion to the assets that he declared." Herbert Rosenkranz, "Austria," in Israel Gutman, ed., 1 *Encyclopedia of the Holocaust* 129 (1990).

Justice Jackson's staff at Nuremberg amassed overwhelming documentary evidence establishing the link between dispossession of Jews and the larger pattern of massive criminality comprehended under the terms, "genocide," "war crime," and "crime against humanity." For example, shortly after the Anschluss Arthur Seyss-Inquart – the Austrian Quisling – acted immediately upon an order from Hermann Göring to institute antisemitic measures. "The process of isolation and abuse [of Jews] had been a gradual one in Germany. More than two months had passed between Hitler coming to power [in January of 1933] and the April boycott. Two and a half years had intervened between the April boycott and the Nuremberg Laws. But for the Jews of Vienna, the torments and the discrimination were immediate." Martin Gilbert, *The Holocaust* 59-61 (1985) (describing deprivation of all civil rights, similar episodes of violence against Jews in Vienna, including looting of shops, the breaking of heads, the tormenting of passers-by).

Kristallnacht or "Night of Broken Glass" (November 9-10, 1938) was the name given to a night not of occasional hooliganism, but of massive systematic violence against

Jews throughout Germany and Austria. Hundreds of synagogues were desecrated or burned. So were thousands of Jewish businesses, all of which were Aryanized after this night. After these pogroms in Austria,

> Eichmann imprisoned Jews in concentration camps as a means of extorting money from them and forcing them to speed up their emigration. When such a detainee was released, he was given a time limit in which to make his emigration arrangements; if he was still there after the limit had passed, he was again imprisoned. As a result there were a growing number of instances when adults or heads of families emigrated and left behind elderly parents and children. The number of old and infirm persons who had no relatives to care for them grew to 25,000 and there was a comparative rise in the number of abandoned children.

Herbert Rosenkrantz, "Austria," in Gutman, ed., 1 *Encyclopedia of the Holocaust* 129-130.

At Nuremberg, Justice Jackson's associate Lt. Henry K. Atherton described the "efficiency" of the "wholesale larceny" practiced by the Austrian Nazis against the Jews of Austria. Shortly after Kristallnacht, at a meeting in Berlin on November 12, 1938, Seyss-Inquart stated to Hermann Göring:

> "Your Excellency: In this matter we have already a very complete plan for Austria. There are 12,000 Jewish artisans and 5,000 Jewish retail shops in Vienna. Before the seizure of power we had already a definite plan for tradesmen, regarding this total of 17,000 stores. Of the shops of the 12,000 artisans about 10,000 were to be closed definitely and 2,000 were to be kept open; 4,000 of the 5,000 retail stores should be closed and 1,000 should be kept open, that is, Aryanized. According to this plan, between 3,000 and 3,500 of the total of 17,000 stores would be kept open, all others closed. This was decided following

investigations in every single branch and according to local needs, in agreement with all competent authorities, and is ready for publication as soon as we receive the law which we requested in September. This law shall empower us to withdraw licenses from artisans quite independent of the Jewish question." Göring said: "I shall have this decree issued today." Fischbök [a member of the Seyss-Inquart's official family] says [to Göring]: "Out of 17,000 stores 12,000 or 14,000 would be closed and the remainder Aryanized or handed over to the Bureau of Trustees which is operated by the State." And Göring replies: "I have to say that this proposal is grand. This way the whole affair would be wound up in Vienna, one of the Jewish capitals, so to speak, by Christmas or by the end of the year." The Defendant Funk then says: "We can do the same thing over here." In other words, Seyss-Inquart's so-called solution was so highly regarded that it was considered a model for the rest of the Reich.

3 *Trial of the Major War Criminals Before the International Military Tribunal* 342-343 (Nuremberg, 1947).

Professor Pauley writes: "Austrians were involved not only in planning and administering the deportations but also in operating the death camps. By far the best known of these Austrians was Adolf Eichmann, who in October 1939 was put in charge of Jewish deportation for the entire Reich. Austrians made up 80 percent of Eichmann's staff. Three-fourths of the commandants and 40 percent of the staff who actually operated the death camps were also Austrians. Odilo Globocnik, who had joined the Austrian Nazi Party in 1920 and who became the gauleiter of Vienna for a time shortly after the Anschluss, exercised supervision over Treblinka, Sobibor, and Belzec, three concentration camps whose only purpose was to kill Jews as expeditiously as possible and where, in fact, two million Jews were murdered. The commandant at Treblinka, the largest of these three camps, was likewise an Austrian,

Franz Stangl. The concentration camp of Mauthausen, near Linz, which by early 1945 had more than 84,000 inmates in forty-nine satellite camps, was by far the harshest of all the camps inside the prewar territory of the Third Reich. The prisoners were worked to death in quarries within a few months. . . . Simon Wiesenthal, the internationally renowned hunter of Nazi war criminals, has estimated that Austrians were directly or indirectly responsible for the deaths of three million Jews during the Holocaust. Austrians also made up 13-14 percent of the SS, even though they made up only about 8 percent of the population of the Greater German Reich." *Id.* at 491.

As the extortionate deal entered into between Austria and the Altmann's attorney in 1948 illustrates, the mistreatment of Jews by Austria continued after the war. Another way of resolving the question presented is that the Federal Sovereign Immunity Act [FSIA] works no impermissible retroactive effect upon Austria in the circumstances of this case since the ongoing deception about the extortion was only disclosed to Maria Altmann in 1999, whereupon she promptly sought restitution. This view of the facts dissolves the focus on the magic moment in time when the FSIA conferred jurisdiction upon federal courts over expropriation claims lodged against foreign states.

II. Federal Courts Have Plenary Jurisdiction over the Crime of Genocide and its Fruits

Amici support the legal analysis of the jurisdictional question in the brief submitted by the respondent. We continue to focus our contribution on legal history. In this manner we hope to offer the Court guidance that comes from a discipline that the Court has itself employed from time to time in its opinions.

If a slave ship ran aground in Connecticut, could a foreign state be allowed to assert its sovereign property interest in slaves and demand the return of the slaves? This Court rejected Spain's claim to that effect in *The*

Amistad, 40 U.S. 518 (1841). Justice Story ruled that the Africans on board *The Amistad* were free individuals. Kidnapped and transported illegally, they had never been slaves. Although there is no close analogy between the mistreatment of slaves as "chattels personal" and the wrongful possession of a piece of art, the Nazis' dispossession of Jews was linked to their mistreatment of Jews in slave labor camps such as Mauthausen and to their murder of Jews by the millions in the death camps. The "slaves" who rose up in protest against their bondage on *The Amistad* were not really slaves, this Court taught. So also the "property" that Austria claims as its national treasure was never within its proper dominion, and after proper procedure on remand should be set free from Vienna and restored to Maria Altmann.

A country may not invoke sovereign immunity if it had obtained property that is the fruit of piracy, for customary international law has outlawed piracy and the remedy of forfeiture would apply to such booty. So also, the remedy of forfeiture has been applied to Austria's ongoing possession of Nazi-looted art without the sovereign immunity defense being of much avail. *See, e.g., United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000). The only significant difference between piracy and Nazi plunder is that the one made transportation and commerce by sea more perilous than it should be, and Nazi looting and its correlative polices made the entire land mass of Europe unsafe for millions.

This Court should no more allow any nation to take advantage of Nazi-looted art than it would allow a foreign nation to enjoy the fruits of slavery or piracy. Federal courts most emphatically have plenary jurisdiction over the crime of genocide and its fruits. No nation enjoys sovereign immunity from this crime, any more than it would from acts of piracy, terrorism, or engaging in slavery.

The Genocide Convention contains two provisions that shed light upon the interpretation the FSIA in the case now before the Court. First, far from preserving a theory

of absolute sovereign immunity, the Convention renders this defense completely unavailable. In the immediate aftermath of World War II, individual defendants who were accused of war crimes were not allowed to rely exclusively upon a defense of superior orders, nor was the defense of sovereign immunity entertained with any seriousness. There is no such defense to war crimes or crimes against humanity. And the Treaty of London that defined those crimes in establishing the charter of the International Military Tribunal at Nuremberg had no impermissible retroactive effect, for the treaty merely codified the long-established moral and legal principles governing the use of force already reflected in numerous treaties and in customary international law. Second, the Convention obliges states to extradite genocide suspects to a tribunal with jurisdiction to hear a case arising under the Convention. Sovereign immunity is no defense under these circumstances.

The Court of Appeals rejected petitioners' view that the application of section 1605(a)(3) of the FSIA would work an impermissible deprivation of their settled expectations to sovereign immunity. In effect, the Court of Appeals ruled that the crime of genocide is such an enormous violation of the basic building blocks of international law that no court ought to erect needless barriers to litigation of claims relating to this crime. For the reasons set forth in section I, amici urge that this view is correct.

III. Austria's Claim to Absolute Sovereign Immunity Must Be Evaluated with the Matrix of Critical Historical Developments in the Twentieth Century

A. Treaty Obligations as a Limit Upon Sovereign Immunity

The rise of complex multilateral covenants and treaties corresponds to the historical demise of the theory of absolute sovereign immunity. Any nation that enters into a

treaty limits *its* sovereignty by that very act. *See, e.g.*, Austrian Const. Art. 9(1) (generally recognized rules of international law regarded as integral parts of federal law). Justice Jackson's colleague at Nuremberg, Sir Hartley Shawcross, Chief Prosecutor for the United Kingdom, put it this way: "In the international field the source of law is not the command of a sovereign but the treaty agreement binding upon every state which has adhered to it. . . . [A]s M. Litvinov once said: 'Absolute sovereignty and entire liberty of action belong to such states as have not undertaken international obligations. Immediately a state accepts international obligations it limits its sovereignty.'" 3 *Trial of the Major War Criminals before the International Military Tribunal* 103 (1947).

B. The Claim of Austria to an Expectation of Absolute Sovereign Immunity is Negated by International Covenants to which Austria is a Party, by Austria's Theory and Practice Relating to Sovereign Immunity, by the State Treaty of 1955 under which it Reentered the Family of Nations in 1955, and by Recent Legislation

The United States suggests in its amicus brief that the jurisdictional point turns on whether Austria was a "hostile nation" during World War II. This is a red herring. Amici understand that Austria was illegally annexed to Germany in violation of the Treaty of St. Germain, the 1919 peace accord that divided up the old Austro-Hungarian Empire. And we understand that in an effort to warn Austrians to stop their bad behavior against Jews, the Allied Powers in 1943 issued the Moscow Declaration characterizing Austria as the first victim of Nazi aggression. But whether or not Austria existed as a "friendly" or "hostile" nation-state during the time of the Nazi pillage and plunder of Jewish property is entirely irrelevant to the consideration that no nation may legitimately profit from such plunder either by deceiving the owners of the

art about critical information, or simply by redefining the booty as part of its "national cultural heritage."

The United States suggests that the Tate Letter of 1952[2] provides a magic date for determining when the United States shifted away from absolute sovereign immunity. It does not. As the respondent demonstrates, Br. Res. 17-23, the law of limited sovereign immunity was the law of this land from the Marshall Court on. Thus the modern period merely reflects and reclaims a very old tradition in American legal history.

Within the modern period the most critical *dates* to identify are: *1939*, when the Nazis raided the Bloch-Bauer home and stole the paintings, and *1941*, when the Nazi art liquidator Dr Führer "donated" the disputed paintings to the Austrian Gallery. Both of those dates are in the period of Nazi occupation and domination of Austria. And the critical *fact* to identify in both of those events is that the subjects engaged in the unlawful taking and unlawful "giving" were the Nazis, found at Nuremberg to have looted and plundered as part of a massive conspiracy to murder. In short, the government's brief proves much too little by failing to focus on who did what, when and to whom.

Petitioners also fail to account for five crucial facts within Austrian history. First, Austria, as the successor nation-state to the Austro-Hungarian Empire, limited its

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[2] There are at least three other dates before 1952 when the Executive Branch moved away from the view that sovereign immunity is absolute: (1) 1943, when the United States joined the other Allies in the London Declaration, *supra* (denouncing dispossession), (2) 1948, when the Department of State announced that it was reconsidering its view of sovereign immunity, J. App. 49a, and (3) April 27, 1949, when State issued an announcement denouncing discriminatory dispossession by the Nazis and relieving "American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." J. App. 52a (emphasis added).

sovereignty when it ratified the Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, 1 Bevans 631, 1907 U.S.T. LEXIS 29 (entered into force Jan. 26, 1910). Article 46 forbids the confiscation of private property, Article 47 forbids pillage, and Article 56 specifically forbids "[a]ll seizure of . . . works of art."

Second, as the Court of Appeals found, Austria had already moved away from a general theory of absolute sovereign immunity in the 1920s, Pet. App. 20a. *See also Dralle v. Republic of Czechoslovakia*, 17 I.L.R. 155, 163 (Supreme Court of Austria 1950) (foreign state may not avoid responsibility for violations of international law by invoking sovereign immunity).

Third, in conformity with the spirit of the London Declaration of 1943 (repudiating dispossession), Austria's Second Republic officially repudiated all transactions in the property of Nazi victims, declaring them null and void. Nullity Act of 15 May 1946. J. App. 40a. Soon thereafter, Austria enacted on July 26, 1946 and February 6, 1947 three statutes designed to accomplish restitution of Nazi-looted property. *See* J. App. 214a-215a.

Fourth, when Austria sought to rejoin the family of nations as an independent nation, it pledged to restitute all unreturned Nazi-looted property. 1955 State Treaty, Art. 26, ¶ 1, cited in Opp. App. C, TIAS 3298, 6 U.S.T. 2369 (May 15, 1935).

Fifth, after intense negotiations, the Clinton administration convened a major international conference in Washington in December 1998.[3] At this conference Austria announced that it would enact federal legislation to

[3] *See* www.state.gov/www.regions/eur/981203_heac_art_princ.html (text of Washington principles agreed to by 44 nations, including Austria); *see also* Geri Yonover, "The Return of Nazi-Looted Art: Choice of Law Issues," in John K. Roth, ed., 2 *Remembering for the Future: The Holocaust in the Age of Genocides* 952 (2001).

enforce the duty of restitution of Nazi-looted art, and it described to the other 43 nations at the conference its laudable efforts to catalog confiscated art in its state museums and to return them to their rightful owners. Austria enacted this legislation on December 4, 1998, the day after the end of the Washington Conference. And Austria has settled a major dispute with the Rothschild family, restoring to them more than 250 treasures that the Nazis had looted and that Austria had retained as part of its "national cultural heritage" for decades.

All of these considerations should lead this Court to the conclusion that Austria may not now be heard to claim absolute sovereign immunity in a case seeking replevin of Nazi-looted art that is the fruit of a vast conspiracy to murder.

IV. Jurisprudential Reasons for Affirming the Court of Appeals

A. This Court Should not Employ Formalistic Legal Reasoning that Masks the Worst Crime of the Twentieth Century

This Court should avoid exalting legal formalism in a manner that would enable any country to profit from avoiding its responsibility to return Nazi-looted art to those from whom it was stolen or to their sole surviving heirs. To do so would send a curiously mixed signal to Austria and other nations about the correlative duties – now widely acknowledged in the art world – to search carefully for evidence of Nazi-looted art and to return it promptly to its rightful owners.[4] In the past decade,

[4] *See* American Association of Museum Directors, *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945)* (guidelines on searching provenance of art during 1933-1945 and making restitution to rightful owners) www.aamd.org/guideln.shtml; *see also* Geri Yonover, "The Return of Nazi-Looted Art,"

(Continued on following page)

moreover, this country redoubled efforts to encourage honoring the moral duty of restitution of stolen property. Those negotiations over the compensation for looted assets in Swiss banks, for looted art such as the paintings at issue in this case, and for some sense of the value of slave labor, and litigation such as the instant case, are all part and parcel of the "government statements, documents, and actions expressing the United States' strong condemnation of Nazi atrocities." Br. of United States as Amicus Curiae, 28. This is not, of course, a partisan point, but an observation that can be made of every administration from President Roosevelt's to the present.

The behavior of Austrians toward their Jewish neighbors immediately after the Anschluss, during World War II, and after the war, is a reprehensible chapter in Austrian history. Austria has made major steps toward acknowledging responsibility for this disgraceful period. For example, in 1998 it enacted legislation that promised to return art that came into Austrian possession because of the Nazi period. This case can be a win-win. By affirming the

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note 3 *supra*, 960, n. 4. The organizer of the Washington Conference, Ambassador Stuart Eizenstat, describes the dramatic results of these principles: "major art museums in this country and throughout the world are spending money and allocating staff to research provenance to detect whether paintings have been looted. Thousands of pieces of art have been listed on Web sites." Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* 343-344 (2003). For example, the *Central Registry of Information on Looted Cultural Property 1933-1945*, http://www.lootedart.com/, aims "to advance knowledge of the cultural spoliation of Europe by the Nazi regime." The site contains two databases, the Information and Object Databases, with the goal of documenting "the fate of families, works of art and institutions" during the Nazi era. Because of this information system, hundreds of objects of art are now being returned to their rightful owners.

Court of Appeals, this Court can allow an elderly citizen unimpeded access to the only forum in which at this stage of her life she can afford to pursue any meaningful relief. And in the same moment, this Court can provide Austria with an opportunity to continue in the direction it endorsed in the statutes of 1946 that nullified the Nazi transactions, in the State Treaty of 1955 announcing to the world that it would restore Nazi-looted artworks to their rightful owners, and in the recent federal legislation of 1998 publicly endorsing the "Washington Principles."

For the Court to announce that no foreign government need ever be accountable in a federal court for returning Nazi-looted property is akin to contradicting the declared foreign policy of this country since at least 1943, when we joined the London Declaration. We put this policy into practice in 1945 as soon as our GIs began stumbling upon enormous treasures of art that the Nazis had looted – primarily from Jewish art collectors before they were deported to death camps – and secreted for placement in a grand art museum that they planned to erect in Hitler's home town, Linz, Austria. *See* the reports by the director of the Art Looting Unit of the O.S.S., James S. Plaut, "Loot for the Master Race," *Atlantic Monthly* (Sept. 1946) and "Hitler's Capital," *id.* (Oct. 1946) (Nazi art theft in occupied Europe "the most extensive and highly organized series of thefts devised by a nation in modern times").

To grant the relief sought by the petitioners is akin to sending the world a double message along the following lines: "Please return stolen art to its rightful owners. But if you like this art a lot, or if you find it to be 'art of national significance,' Br. Pet. 5, or if keeping this art will help attract tourists to your capital, by all means keep it, and we'll find a way of making sure that no one can use our courts to establish whether it belongs to you or not."

B. Affirming the Court of Appeals Would Have no Negative Impact on Foreign Relations

In its amicus brief the United States urges the Court not to interfere with the exclusive domain of the executive branch over foreign policy. There are several things wrong with this view.

First, the Executive Branch has a very vital role to play in the execution of foreign policy, but by no means exclusive control over this dimension of public life. James Madison, the father of the Constitution, was famously opposed to concentration of powers in the new republic, and accordingly devised a model of separate powers with checks and balances among the three branches of government. *See The Federalist* Nos. 10, 51. Hence it is unsurprising that Madison assigned important powers over foreign policy to Congress, Art. I, § 8 (power to regulate commerce with foreign nations, power to declare war, power of the Senate to confirm Ambassadors) and to the Judiciary, Art. III, § 2 (judicial power extended to all cases arising under treaties, affecting ambassadors, and to controversies between a state or its citizens and foreign states).

Second, this Court need not fear that it will adversely affect the Nation's foreign relations by carrying out its constitutional mission of adjudicating cases and controversies which entail construction of statutes such as the FSIA within the broad context of the Nation's history.

Third, far from interfering with the foreign policy of the United States, construing the FSIA to allow use of the federal courts to redress grievances arising from the Holocaust era enables those claims to be resolved judiciously and in conformity with the rule of law that was espoused by this country when it undertook its titanic struggle in World War II against Fascism.

Fourth, comity among nation-states – the basic purpose of sovereign immunity – will not be injured by affirming in this case, for there no longer exist any Nazi regimes, or any regime entitled to comity under circumstances of this case.

The incidental state beneficiaries of Nazi war crimes have an interest too dubious to sustain or justify absolute sovereign immunity.

C. Affirming the Court of Appeals is an Honorable Way of Bearing the Burden of Memory of the Shoah

Holocaust revisionism is a lamentable phenomenon that can no longer be ignored. Once dismissed as a lunatic fringe, Holocaust-deniers have been growing in numbers and influence during the past 25 years, and now sprout websites on a weekly basis. *See, e.g.*, Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (1994) (providing numerous examples of attempts to prove that the extermination of six million Jews is a hoax; that only a few thousand Jews died in the camps from disease; that the Allied bombings of German cities were worse than any Nazi offense; and that the "true victims" of World War II were the German or the Austrian people).

Amici do not suggest that by raising the defense of absolute sovereign immunity in the circumstances of this case, Austria is indulging in Holocaust denial. We do, however, insist that in construing the FSIA here, the Court may not escape the duty of remembering the raid on the Bloch-Bauer home in 1939 and the major thefts that occurred that day and the weightier matters of the Nazi war against the Jews. It is true, as the Moscow Declaration asserted, that Austria was the first victim of Nazi aggression. But that is a half-truth that should not distract the Court's attention from another very painful truth: that thousands of Austrians perpetrated countless acts of depravity and brutality upon the Jews of Austria. The Court should not be distracted from the urgent task at hand: to provide an effective remedy to an elderly survivor of the Shoah who deserves to have her family's things restored to her before she dies.

Sir Hartley Shawcross, Chief Prosecutor for the United Kingdom at Nuremberg, observed: "Human memory is very short. Apologists for defeated nations are sometimes able to play upon the sympathy and magnanimity of their victors, so that the true facts, never authoritatively recorded, become obscured and forgotten." 3 *Trial of the Major War Criminals before the International Military Tribunal* 91 (1947). The IMT produced a voluminous record of the true facts of the Nazi atrocities, lest these facts become obscured and forgotten. It is far too soon after these events for this Court or any agency of the United States to obscure or forget these facts.

No one has stated more powerfully the duty to bear the burden of this memory than the Nobel Peace laureate Elie Wiesel, who wrote at the end of *Night*:

> Never shall I forget that night, the first night in camp, which has turned my life into one long night, seven times cursed and seven times sealed. Never shall I forget that smoke. Never shall I forget the little faces of the children, whose bodies I saw turned into wreaths of smoke beneath a silent blue sky. Never shall I forget those flames which consumed my faith forever. Never shall I forget that nocturnal silence which deprived me, for all eternity, of the desire to live. Never shall I forget those moments which murdered my God and my soul and turned my dreams to dust. Never shall I forget these things, even if I am condemned to live as long as God Himself. Never.

One who has lived through the experiences of the death camps and witnessed the murder of a parent or other family member can never forget these realities. Those who did not live through these realities have only the memory of another's memory, and this secondary memory may fade over time. Precisely in order to avoid the premature diminution of the memory of the Shoah by the general public, however, this nation has erected holocaust museums in our capital and in many of our states.

It is much too soon in the history of the world to elide the reasons why the American people, including several members of this Court, went to war against the Nazis, or to forget what General Eisenhower learned when he visited the camps liberated by the Allies and saw emaciated walking skeletons. These reasons included respect for private property and freedom from invidious discrimination on the basis of race and religion. This Court has for the most part played an important role after the war in the struggle to achieve these values within our own society. *See, e.g., Brown v. Bd. of Education*, 347 U.S. 483 (1954) (racial discrimination violates the Fourteenth Amendment); *Church of the Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (religious discrimination violates the First Amendment applied to the States). At this critical moment in history this Court should not send to foreign states the message that they may trample upon these values without ever worrying about being held accountable in our federal courts for benefiting from racial and religious discrimination.

This is a civil action to remove the very dark cloud that now hangs over six paintings that Austria claims as a national treasure, but that Maria Altmann views as the last remaining family possessions that were stolen by the Nazis. Fortunately, the moment has long since passed when Austria hides behind the half-truth that it was a victim of Nazi aggression. It has for many years been engaged in constructive efforts to confront and learn from the sad truth that Austrians – including Adolf Hitler, Adolf Eichmann, Arthur Seyss-Inquart, Odilo Globocnik, and Franz Stangl – led and carried out systematic murder of the Jews of Europe. We realize that the current government of Austria is emphatically not Nazi. Indeed, we acknowledged repeatedly above that the current government of Austria has made important strides in redressing the wrongs that arose in the Nazi period, including the looting of art. All that amici now urge is that Austria be required to go forward in an American court on the merits of its claim of good title to the disputed art. Or in the alternative, it can simply restore the paintings to their

rightful owner and go about all of its other business with no interference whatever with its sovereignty.

By allowing this case to proceed on the merits, this Court would fulfill a moral obligation described by one of the most vivid witnesses to the Shoah: "The duty to remember covers not only big accounts, huge palaces, and rare art collections but also less wealthy families, small merchants, cobblers, peddlers, school teachers, water carriers, beggars; the enemy deprived them of their pathetically poor possession, such as a prayer book, a shirt, a comb, eyeglasses, toys. In other words: the poor victims were robbed of their poverty." Elie Wiesel, "Foreword," Stuart Eizenstat, *Imperfect Justice* xi (2003). As painful as the burden of this memory may be, we dare not forget.

CONCLUSION

For the reasons stated above and in the brief for respondent, the judgment of the Court of Appeals should be affirmed.

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APPENDIX A

Statements of Interests of Particular Amici

Michael Berenbaum served as project director of the U.S. Holocaust Memorial Museum. He is a Holocaust Scholar whose writings include *A Promise to Remember: The Holocaust in the Words and Voices of Its Survivors* (2003); *The World Must Know: The History of the Holocaust Told in the U.S. Holocaust Memorial Museum* (1993); and *The Vision of the Void: Theological Reflections on the Works of Elie Wiesel* (1979). He edited *Witness to the Holocaust* (1997) and *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis* (1990). With Michael J. Neufeld he co-edited *The Bombing of Auschwitz: Should the Allies Have Attempted It?* (2000). With Abraham J. Peck, he co-edited *The Holocaust and History: The Known, the Unknown, the Disputed, and the Reexamined* (1998). With Betty Rogers Rubenstein he co-edited *What Kind of God?: Essays in Honor of Richard L. Rubenstein* (1995). With Yisrael Gutman he co-edited *Anatomy of the Auschwitz Death Camp* (1994). With John K. Roth he co-edited *Holocaust: Religious and Philosophical Implications* (1989). He is also the executive producer of "Desperate Hours" (2001), a documentary film about the Shoah in Turkey.

Judy Chicago and Donald Woodman are artists. They are the co-authors of *The Holocaust Project: From Darkness to Light* (1993), an account of their journey to several concentration camps and death camps in Europe, and the photography and painting that ensued from this journey. The volume includes a study of the suffering, including torture and death, inflicted upon prisoners detained at the slave labor camps around Mauthausen, Austria.

Hedy Epstein is a survivor of the Shoah who left her home in Kippenheim, Germany in 1939 at the age of 14 as part of the Kindertransport to England. Her story is narrated in the film "Into the Arms of Strangers: Stories of the Kindertransport" (2000) and in the companion volume of the same title. She lives in St. Louis, and for decades she has been engaged in human rights and social justice issues, especially in fair housing in the Greater St. Louis Area. She has also been involved for decades in Holocaust education at all levels.

Hector Feliciano is an art historian and the author of *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* (1998).

Peter Harclerode is an author. Brendan Pittaway has been a journalist with BBC TV and is currently a communications consultant in Manchester, England. They co-authored *The Lost Masters: World War II and the Looting of Europe's Treasure Houses* (2000).

Deborah E. Lipstadt is the director of the Rabbi Donald A. Tam Institute for Jewish Studies and the Dorot Professor of Modern Jewish and Holocaust Studies at Emory University. She is the author of *Denying the Holocaust: The Growing Assault Upon Truth and Memory* (1993); *Beyond Belief: The American Press and the Coming of the Holocaust, 1933-1945* (1987).

Franklin H. Littell is Distinguished Professor of Holocaust and Genocide Studies at the Richard Stockton College of New Jersey and Professor Emeritus of Religion at Temple University. He has written or edited 30 books and over 500 scholarly articles on Religious Liberty, Jewish Christian Relations, The Holocaust and Genocide which include *American Protestantism and Antisemitism*

(1985) and *The Crucifixion of the Jews* (1975). *The German Church Struggle and the Holocaust,* co-edited with Hubert G. Locke (1974), *Hyping the Holocaust* (1997), Historical Atlas of Christianity (2001), *A Christian Response to the Holocaust: Selected Addresses and Papers 1952-2002.* (2003). He is the co-founder of The Scholars' Conference on the Holocaust and the Churches, an annual meeting that draws scholars from all over the world to explore the ongoing significance of the Shoah.

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Nazis: Barmen Then and Now (1984). With Marcia Sachs Littell he co-edited *Holocaust and Church Struggle: Religion, Power, and the Politics of Resistance* (1996), and *Remembrance and Recollection: Essays on the Centennial year of Martin Niemöller and Reinhold Niebuhr, and the Fiftieth year of the Wannsee Conference* (1996). With Franklin H. Littell he co-edited *What Have we Learned?: Telling the Story and Teaching the Lessons of the Holocaust: Papers of the 20th Anniversary Scholar's Conference* (1993), and *The German Church Struggle and the Holocaust* (1974), and he is the co-founder of The Scholars' Conference on the Holocaust and the Churches.

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APPENDIX B

Letter of Ferdinand Bloch-Bauer to Oskar Kokoschka, April 2, 1941

Dear friend and professor!

It pleasured me very much to hear from you after such a long time, especially that you are doing well and that you are still the brave fighter! I heard on the radio that Benes donated a picture of yours to the Tate Gallery! Nice!

In your position I would have gone to America and if it is still possible, go immediately! Europe will be a heap of ruins, perhaps the whole world; for art there will be no place here for decades! My people are in Canada in Vancouver, would like that I come, but I am already too old! I think about it, although I believe that I have missed the ferry.[1] For months there is no seat on a ship, not a clipper available! Your friend Dr. Ehrenstein was here with me yesterday. He obtained a visa for America, but how can he get over there?

In Vienna and Bohemia they took away *everything* from me. Not even a souvenir was left for me. *Perhaps* I will get the 2 portraits of my poor wife (Klimt) and my portrait. I should find out about that this week! Otherwise I am totally impoverished and probably will have to live very modestly for a few years, if you can call this vegetation living. At my age, alone, without any of my old attendants, it is often terrible. I have luckily a few good friends here in Geneva and Lausanne. Now I am already amortised,[1] will wait and find out, whether justice will still come, then I will gladly lay my hammer down!

What one hears from Vienna and Prague is terrible!

Now I wish you, from my heart, all the best and remain with heartfelt greetings

Your old dear true Ferdi.

Source: Sultano and Werkner, *Oskar Kokoschka.Kunst und Politik 1937-1950*, p. 124 (Vienna: Böhlau, 2003) (translated from German, emphasis in original).